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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 608.

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF APPELLEE, THE CITY OF COLUMBUS.

STATEMENT OF THE CASE.

This is an appeal by The Columbus Gas and Fuel Company from a judgment of The Supreme Court of Ohio,

reversing on error proceedings, an order of The Public Utilities Commission of Ohio fixing natural gas rates within the City of Columbus.

On September 3, 1929 the City of Columbus, sometimes hereinafter referred to as the City, passed "An Ordinance No. 645-29—To regulate the price that may be charged for natural gas in the City of Columbus during the period of five years from the twelfth day of November, 1929, and providing for the submission of this Ordinance to a referendum vote at an election to be held November 5, 1929", hereinafter referred to as the ordinance. It was submitted to a vote of the qualified electors of the said City on November 5, 1929 and was approved by a majority of those voting thereon. By its terms it provided for a rate of 48 cents per M c. f. with a minimum monthly charge of 75 cents and was to become effective from and after November 12, 1929. (R., 130.)

On December 31, 1929 The Columbus Gas and Fuel Company, a public utility corporation organized and existing under the laws of Ohio, distributing natural gas for light, heat and power purposes to consumers in the said city and smaller surrounding towns, filed a complaint in writing against the said ordinance with the Public Utilities Commission of Ohio, sometimes hereinafter referred to as the Commission.

The Columbus Gas and Fuel Company (and its predecessor, The Columbus Natural Gas and Fuel Company) has been engaged in the distribution of natural gas in the City of Columbus, Ohio since the spring of 1890 under a

franchise granted to The Columbus Natural Gas and Fuel Company dated February 4, 1889. (R., 128.) In 1929 it had approximately 54,000 customers whose total consumption was 5,848,495 M c. f. (R., 2876.)

An affiliated company of The Columbus Gas and Fuel Company, known as The Federal Gas and Fuel Company, also distributes gas in the City of Columbus. It did not complain to the Commission about the ordinance but continued to retail gas at 48 cents per M c. f. and is still doing so. (R., 3075.)

On March 4, 1932, after some 11,000 pages of testimony had been offered, some 700 exhibits presented and relevant matters carefully briefed and argued, the case was submitted to the Commission, and on October 3, 1932 it made and entered its findings and order. (R., 142, 185.) As is required by legislative enactment in Ohio (G. C. 499-9, Appendix) the Commission found the reproduction cost new, less depreciation, of all physical property other than land as of a date certain. This valuation was made as of December 31, 1929 and prices as they existed on that date were employed. The prices thus used therefore antedate the depression period with its low cost levels.

The five year ordinance will end November 11, 1934 and practically its entire duration will have been within the period of depression with its changed economic conditions. This lowering of prices and the resultant reduction in the rate base and other values were not taken into consideration by the commission.

The majority of the Commission entered an order (P. U. R. 1933A, 337) setting aside the rates embodied in the

ordinance and fixing the price to be charged for natural gas by the appellant in the City of Columbus during the period in question at 55 cents per M c. f. with an additional charge of 5 cents per M c. f. if monthly bills are not paid within a fixed time and a monthly minimum charge of 75 cents without discount. (R., 185.)

The minority of the Commission, in a separate opinion, (P. U. R. 1933A, 378) dissented from the holding of the majority, finding that the rates set forth in the ordinance in question were reasonable, just and lawful, and sufficient to yield a reasonable compensation to the appellant. (R., 189.)

From the finding and order of the Commission both the City of Columbus and The Columbus Gas and Fuel Company prosecuted error to the Supreme Court of Ohio. Arguments were made on March 15, 1933 and on June 21, 1933 the Court, holding that the rate established by the ordinance in question is neither unreasonable, unlawful nor confiscatory, reversed the order of the Commission. (R., 50.)

> **City of Columbus v. Public Utilities Commission, Columbus Gas and Fuel Company v. Public Utilities Commission,** 127 O. S. 109; P. U. R. 1933D, 238; 187 N. E. 7.

The ordinance, the order of the Commission and the judgment of the Court result in establishing a rate for only The Columbus Gas and Fuel Company. (R., 185.) The Ohio Fuel Gas Company and The United Fuel Gas Company are not parties to this proceeding, and no order compelling them to charge any given rate has

ever issued in this case. These companies are all interrelated and evidence concerning the supplying companies was brought before the Commission by the appellant, on motion of the City and order of the Commission, for the sole purpose of determining what price for gas is a proper charge to appellant's operating expenses.

There exists no appreciable difference of opinion in either the Commission or the Court, or between those bodies, concerning valuations, allowances or rates made for The Columbus Gas and Fuel Company, except as to the proper inclusion in operating expenses for the cost of purchased gas. The distribution rate found by both the majority and minority Commissioners, and not disturbed by the Court, is 16 cents per M c. f. (R., 182, 179; 220, 217; 50.)

The Columbus Gas and Fuel Company, sometimes referred to herein as the Columbus Company, is a part of the Columbia System of which The Columbia Gas and Electric Corporation, organized under the laws of the State of Delaware, is the holding company. To be more specific, the securities of the appellant, except qualifying shares, are owned by The Columbia Gas and Electric Corporation. (R., 3072.)

The Federal Gas and Fuel Company of Columbus is also owned by The Columbia Gas and Electric Corporation. (R., 3072.)

The Source and Cost of Purchased Gas.

The Columbus Company secures all of the gas distributed by it from The Ohio Fuel Gas Company, an Ohio public utility corporation, for which it pays a certain price at the city "gate". The Ohio Fuel Gas Company will be referred to hereinafter as Ohio Fuel. (R., 2879.)

Ohio Fuel produces a large amount of gas in Ohio from its own wells, purchases a very considerable amount from other Ohio producers, and also purchases a large amount from The United Fuel Gas Company, (R., 2915), hereinafter referred to as the United, a West Virginia corporation, which secures its gas very largely in the State of West Virginia. The Columbia Gas and Electric Corporation is also the parent company of both Ohio Fuel and United. (R., 144.)

The United has for itself a rather wide domain, producing large quantities of gas from its own gas lands as well as purchasing from other West Virginia producers, selling directly to many Columbia System subsidiaries who are distributors, distributing in its own name to the residents of many towns and cities, including some in Ohio, and also selling at wholesale a large amount of gas to be carried beyond the confines of the state of West Virginia. Among these purchasers is Ohio Fuel.

Ohio Fuel has a wide-flung area from the Ohio River to Lake Erie, from Cincinnati to Toledo, from Muncie, Indiana to almost the eastern boundary of Ohio—indeed practically the whole state of Ohio except the northeastern part thereof.

For the year 1929 Ohio Fuel reports gas secured as follows:

From United	15,486,218 M c. f.
From independent producers	14,397,893 M c. f.
Produced	29,869,168 M c. f.

(R., 2905, 2906.)

Ohio Fuel is both a retailer and a wholesaler—that is, it is a distributing company in several hundred cities, towns and communities, and also sells gas wholesale to a great many distributing companies, most of which are Columbia System subsidiaries, and among which is the Columbus Company. In 1929 it reported sales as follows: Retail, 25,464,269 M c. f.; wholesale, 29,674,933 M c. f. (R., 2903, 2904.)

The price paid by Ohio Fuel to independent gas producers, even some within less than fifty miles of Columbus, was an average of 15.57 cents per M c. f. (R., 913, 3190B.) At the same time it was paying affiliated companies from 26.91 cents per M c. f. to 35.00 cents per M c. f. (R., 2900.)

Until some time in 1929 there was a contract between Ohio Fuel and the Columbus Company fixing a gate-rate which the Columbus Company should pay Ohio Fuel upon the basis of 65 per cent. of the local retail rate to Ohio Fuel as a gate-rate and the remaining 35 per cent. thereof to the Columbus Company for its income as a distributor. To illustrate, if that gate-rate contract were still in effect and 48 cents were adjudicated to be the proper retail rate, Ohio Fuel would receive 65 per cent. thereof, or 31.2 cents as a gate-rate, and the Columbus Company

would retain 35 per cent. thereof, or 16.8 cents for distribution. (R., 2879, 2888.)

But in the midst of rate controversies and rate litigations some ingenious mind conceived the idea that, at least so far as the Columbia System is concerned, a satisfactory retail rate might be forced by the simple method of increasing the gate-rate. Obviously this was based upon the conception that courts could not interfere with any gate-rate made at "arm's length" or otherwise unless there was something extremely unreasonable or fraudulent about it.

Suiting the action to the thought, in 1929 before the effective date of the Columbus ordinance, Ohio Fuel and the Columbus Company **voluntarily** canceled the old rate and agreed upon a gate-rate of 45 cents—indeed that gate-rate was established for practically the whole of Ohio. (R., 691-694.)

The Record will show that the hearings before the Commission were begun with a frank recognition on the part of the City that unless it had a right seriously and honestly to inquire into the 45 cent gate-rate it would be quite impossible for it to make any showing in respect to the sufficiency of the 48 cent ordinance rate.

But the Columbia System and the Columbus Company in particular were defiant, insisting that unless unreasonableness, unfairness, fraud, or their equivalents, could be uncovered the alleged "arm's-length" gate-rate of 45 cents must stand.

But through our patient, persistent drilling the whole Columbia System was laid bare and it was shown that

the so-called "arm's-length" contract was a sham and a pretense, merely empty talk. In the first place, there were complete interlocking directorates and there were many common leading executive officers. Moreover, the whole Columbia System was so constructed that "his master's voice" at the very top of the pyramid was so amplified as to be heard throughout the structure. (R., 3072-3105.)

Another subsidiary of The Columbia Gas and Electric Corporation is The Columbia Engineering and Management Corporation, which manages, among others, United, Ohio Fuel and the Columbus Company, and furnishes to them certain engineering services. (R., 3077-3079.) A direct charge is made for engineering and in addition 2 per cent. to 2½ per cent. of the gross earnings is charged as the management fee of each subsidiary company. (R., 190.)

The Columbus Company attempted to justify its inclusion for purchased gas by showing the gate-rates elsewhere established by the Ohio Fuel and the general and average charges over the whole country.

A motion was made by the City in the very early stages of the case asking the Commission to require the Columbus Company to present proof of the reasonableness of the price paid at the gate for gas. This motion was sustained by the Commission. (R., 2145.)

We quote the ruling of the Commission in part:

> "This Commission has heretofore issued an order requiring evidence of the reasonableness of the gate-rate price in the Dayton Power and Light Company case. If that order is to be effective and avail this

Commission of the information desired, it will be necessary that the reasonableness of the gate-rate price be actually determined upon facts, not as for the state of Ohio as a whole, but for the City of Columbus or any other municipal unit which might be under consideration.

The Commission believes there is and should be a dedication of all this property used and useful in rendering the service to the people of Columbus from the wells to the last distribution pipe." (R., 2146.)

* * * * * * * * * * * * * * *

"It would be a vain thing for this Commission to take the position that we can determine the reasonableness of the gate-rate and yet could not require all the evidence necessary upon which to predicate such a finding. * * * If state regulatory authority is to be preserved, it must be made effective and unless it can reach to every element which materially affects the ultimate rate to the consumer, such regulatory body is rendered more or less powerless to properly perform its functions."

And the Commission further said:

"It seems to the Commission in this case that there is as complete a monopoly of the production, transmission and delivery of the gas as could be effected, in so far as the City of Columbus is concerned." (R., 2147.)

The Commission declared that it was more than supported by the Illinois Bell Telephone case, which had just been decided.

Smith v. Illinois Bell Telephone Company, 282 U. S. 133, 152; 75 L. Ed. 255, 265, 266; 51 S. Ct. 65.

Since that time the action of the Commission has been fully sustained by this Court in **Western Distributing**

Company v. Kansas Public Service Commission, 285 U. S. 119, 124, 125; 76 L. Ed. 655, 658; P. U. R. 1932B, 236, where it is held that a state public utilities commission may properly require a natural gas distributing company seeking an increase of rates to show the fairness and reasonableness of the rate paid by it to the pipe line company from which it obtains its supply, where both companies are subsidiaries of a third, although this may involve a presentation of evidence as to the property and business of the pipe line company which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.

That case is very similar in many respects to the one at bar.

Even before these two cases, which are decisive, this Court had declared that:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its stockholders."
>
> **United Fuel Gas Company v. Railroad Commission,** 278 U. S. 30; 73 L. Ed. 390.

The Commission very properly concluded that the reasonableness of the price paid for gas by The Columbus Gas and Fuel Company should be determined and that the determination should not be made by guessing, which might severely punish either the City or the Company, but from such evidence as might be necessary to a

fair rate investigation. The Columbus Company was, therefore, required to produce evidence from the Ohio Fuel and United Companies showing those elements entering into the cost of gas at the city gate. Extensive hearings were had and the greater part of the transcript and Record herein were made up in drawing out the basic and relevant facts.

It certainly cannot be contended that sufficient opportunity was not afforded the Columbus Company for showing the proper charge to its operating expense for gas purchased, that the matter was not carefully investigated and considered, or that there was a denial of due process of law.

The majority Commission found that a fair charge to the Columbus Company by Ohio Fuel would be 39.02 cents per M c. f. which is admittedly a system-wide gate-rate for Ohio Fuel. (R., 179.) The minority Commissioner found that a proper charge would be 31.70 cents per M c. f. which is also admittedly a system-wide gate-rate for Ohio Fuel. (R., 216-217.) Adding to these costs the distribution rate of 16 cents plus per M c. f., unanimously arrived at, it will be seen that the majority found the rate for Columbus to be 55.04 cents per M c. f., (R., 182), while the minority found that it should be 47.95 cents per M c. f. (R., 220.)

The judgment of the Court in no way disturbs the distribution rate of 16 cents plus but reduces the fair charge to the operating expense of the Columbus Company to a figure even less than that determined by the minority Commissioner and thus holds the rate established by the ordinance in question to be neither unreasonable, unlawful nor confiscatory. (R., 72.)

THE ASSIGNED ERRORS.

The points urged by appellant in its petition for appeal are 49 in number. (R., 110-119.)

These various assignments of error will be answered in our argument.

CORRECTION OF APPELLANT'S STATEMENT OF CASE.

Appellant's statement appearing in its brief filed herein includes several incorrect assertions. (Company Brief, pp. 4-20.) We shall be content at this time to point out certain statements of fact which are erroneous. In our argument all of these will be answered under their appropriate headings.

(1) At page 15 it is stated that while the majority of the Commission made an allowance for depletion of gas leaseholds and gas wells, the minority made no such allowance. This assertion is incorrect. The language of the minority Commissioner cannot properly be given such construction. (R., 205.)

(2) At page 16 it is stated that the Court below, in reversing the Commission, held that under Ohio law no allowance in operating expenses might be made for the depletion of natural gas fields, wells or equipment. As will presently appear in our argument on amortization, the Court held that if what is sometimes termed amortization can be converted into some sort of depreciation it

may be allowed in Ohio. (R., 69.) This, of course, recognizes that depletion constituting depreciation may be properly allowed for under the facts and circumstances of the case.

(3) At pages 16 and 18 it is stated that the Court below held that in ascertaining the valuation of Ohio Fuel properties and appellant's distribution system no going concern value should be allowed. This is not the fact. The conjectural and excessive claims of the Company were disallowed but going concern value was recognized and included but without separate allowance. This we shall show in the discussion of going concern value.

(4) At pages 16 and 17 appellant states that the Court below held that in ascertaining the valuation of Ohio Fuel property the present value of gas well construction and equipment should be arrived at by deducting from the reproduction cost new a percentage based upon the remaining gas content of the gas field. This statement, as it stands, gives the erroneous impression that the "gas field" refers to all of the operated or Class 1 acreage. As applied by the Commission and the Court, it is based upon the remaining gas content of existing wells.

(5) At page 17 of its brief appellant says the Court below allowed no value for cost of organization in ascertaining the value of the property of Ohio Fuel. In this, as we shall point out under cost of organization, it is mistaken. The minority Commissioner specifically provided for it and his finding was held by the Court to be reasonable and lawful.

(6) At pages 17 and 18 appellant states that no value was allowed for cost of financing "which was shown to have been an expense necessarily incurred in the reproduction of the property". This is not true. The evidence upon which reliance is placed is at best speculative and conjectural as we shall show in our argument on cost of financing.

(7) At page 17 it is stated that the allowance to Ohio Fuel for working capital, materials and supplies was reduced by the judgment of the Court to $1,700,000.00. This is untrue. The Court did not disturb the finding of the majority Commission for this item which it included at a figure of $2,690,132.00. (R., 165, 166.)

(8) At page 17 it is stated that a gas holder actually in use should be eliminated. This appurtenance had been infrequently used for many years and even then for only a few hours each year. It is unnecessary for service in Columbus. (R., 171, 207, 208.) The facts will appear under the discussion of the holder.

(9) At page 17 it is stated that the Court below, in ascertaining the value of appellant's distribution system, held that labor costs should be reduced below the Company's experience and the prevailing labor rates. This is untrue as will appear presently in our argument under labor performance. Current wage rates, as of December 31, 1929, were used by the Commission and approved by the Court. (R., 849, 2488.)

(10) At page 18 it is stated that it was held that labor performance should be raised above not only the Company's experience but the experience of all other

construction work similar in character in the City. Such is not the case, as will appear in our discussion of labor performance. (R., 2490, 5920.)

(11) At page 18 it is stated that an insufficient allowance was made for taxes. This is not the fact, as we shall demonstrate under our discussion of taxes.

(12) At pages 18 and 19 it is stated that the City conceded annual depreciation charges in excess of those approved by the Court. As will presently appear in our discussion of depreciation charge and amortization, the City engineers gave no consideration to the large existing depreciation reserve funds of the companies. These reserve funds were considered and accorded due effect by both the minority Commissioner and the Court.

(13) At pages 18 and 19 it is stated that the United Fuel Gas Company, so far as this case is concerned, does no business in Ohio. The Record shows that it does business in Ohio, distributing gas to a number of towns in the southeastern part of the state, and that it annually reports to the Ohio Commission and is subject to its jurisdiction. We mention this by way of explanation only; the Commission and Court did not pretend to fix a rate for the United.

(14) In other particulars the appellant alleges that the opinions of the Commission and the Court are erroneous. It is unnecessary to make further corrections here; these statements are denied and will be dealt with later in the brief.

SUMMARY OF ARGUMENT.

The City purposes to present first its arguments relative to the assignments of error affecting distribution cost to the Columbus Company, except as to purchased gas.

The Columbus Company alone complained to the Commission of the City ordinance, a rate for it only was declared in the Commission order, (R., 188), and it is the sole appellant before this Court.

Ohio Fuel and United are not parties to this proceeding. They were considered by the Commission in order to determine a proper inclusion for the cost of gas in the operating expenses of the Columbus Company. We shall later discuss the assigned errors relating to that investigation but for the sake of brevity and convenience those subjects common to all these inter-related companies will be disposed of together wherever possible.

Our argument relating to the Columbus Company embraces the following subjects as demanded by the assigned errors and brief of the appellant:

I. Labor Performance.
II. The Gas Holder.
III. Cost of Financing.
IV. Going Concern Value.
V. Overheads.
VI. Working Capital.
VII. Annual Depreciation Charge and Depreciation Reserve.

VIII. Taxes.
IX. Merchandising, or "Load Building Expense."
X. Gas Sales.
XI. Lost Gas.
XII. Collar Leak Clamps.
XIII. Rate of Return.
XIV. Exorbitant Operating Expenses.

Our argument concerning the assigned errors in determining the fair charge of the cost of purchased gas to the operating expenses of the Columbus Company, including both Ohio Fuel and United, will be presented under the following headings:

1. Unoperated Leaseholds.
2. Delay Rentals on Unoperated Leaseholds.
3. Operated Leaseholds.
4. Gasoline Extraction and Oil Production of The Preston Oil Company in Conjunction with Ohio Fuel.
5. Gas Well Construction and Equipment Depreciation.
6. Cost of Organization.
7. Incomplete Construction.
8. Amortization and Depreciation Charge.
9. Allocation.
10. The Cost to Ohio Fuel of Gas Purchased.
11. Contracts Between Related Companies.
12. Other Alleged Errors.
13. Due Process.
14. Conclusion.

A summary of the argument in the order in which the questions will be discussed follows:

I. *Labor Performance.* The Commission's finding, approved by the Court, is supported by the evidence presented by the City.

II. *The Gas Holder.* The gas holder was properly excluded from the rate base. It is not necessary for rendering service in Columbus.

III. *Cost of Financing.* The claims of the Company were only theoretical and not based upon the experience of the Company.

IV. *Going Concern Value.* The demands of the Company were speculative, conjectural and uncertain. The Commission and Court rightly rejected them. The element is recognized and properly included.

V. *Overheads.* The allowances for overheads, including both direct overheads and undistributed construction costs, are indeed liberal.

VI. *Working Capital.* The inclusions for working capital, materials and supplies are adequate and more than meet the operating needs of these companies.

VII. *Annual Depreciation Charge and Depreciation Reserve.* (Columbus Company.) The allowance for this item, in view of the existing depreciation reserve fund and the experience of the Company, is sufficient.

VIII. *Taxes.* The total amounts included for taxes are much larger than is actually required by the companies.

IX. *Merchandising or "Load Building Expense".* The Commission necessarily excluded from operating ex-

penses that part of the purported expenses of the public utility which was contributed to a separate sister appliance sales corporation.

X. *Gas Sales.* The evidence presented by the City in this matter at the insistence of the Company was properly accepted by the Commission.

XI. *Lost Gas.* For this item the Commission adopted the experience of the Company averaged over a 10 year period.

XII. *Collar Leak Clamps.* The Commission disallowed the claimed operating expense for this item because it had already been included as a capital charge. Obviously it cannot be twice included.

XIII. *Rate of Return.* The rate of return is reasonable under existing conditions.

XIV. *Exorbitant Operating Expenses.* The Columbia System claims its profits through devious methods and thus has avoided declarations of dividends by subsidiary companies.

II.

In complaining of the allowance for the cost of purchased gas the appellant cannot here assert the constitutional rights of Ohio Fuel and United. The question is, what the appellant should pay for gas during the life of the ordinance.

1. *Unoperated Leaseholds.* The leaseholds included in this classification are not actually used and useful and were properly excluded from the valuation. The "operated leaseholds" contain adequate reserves within

themselves, and to include such unoperated acreage would place an unwarranted burden to present consumers.

2. *Delay Rentals on Unoperated Leaseholds.* Since the unoperated acreage cannot be included legally in the valuation it follows that the expense of carrying it, known as "delay rentals", cannot be charged as an operating expense against existing consumers.

3. *Operated Leaseholds.* The Columbus Company failed to establish a market value for the operated acreage of Ohio Fuel. The bases assumed by Company witnesses for determining value were wholly speculative and uncertain. These leaseholds are being used in a regulated utility business where rates to be charged consumers cannot be built up by employing a value that depends on earning capacity. Under the evidence and the law, with the burden of proof resting upon the appellant, the value could not reasonably be fixed at an amount greater than the book value assigned by Ohio Fuel.

4. *Gasoline Extraction and Oil Production of The Preston Oil Company in conjunction with Ohio Fuel.* A parasitical private company should not be permitted to operate upon the properties, and at the expense of, a public utility. The Commission and Court were overgenerous in failing to recognize the existing situation between Preston and Ohio Fuel. The manipulation between these companies improperly boosts the cost of production to Ohio Fuel.

5. *Gas Well Construction and Equipment Depreciа-*

tion. The depreciation considered for these accounts is according to the decline in rock pressure of the wells themselves. It was presented by the City based upon a careful study and was employed by the Commission and approved by the Court. The claims of the Company are predicated upon "instruction" from Columbia System officials to Ford, Bacon and Davis to depart from the decline in rock pressure method, heretofore and at the same time employed by them elsewhere, and to use observation alone. This destroyed all possibility of an independent judgment of independent appraisal engineers.

6. *Cost of Organization.* The minority Commissioner specifically provided for this element and his finding was approved by the Court.

7. *Incomplete Construction.* The amount involved in this item is insignificant. It was not included because it was not used and useful.

8. *Amortization and Depreciation Charge.* (Ohio Fuel.) The Company's claim for amortization has no factual basis. The finding of the Commission was predicated upon a clear mistake as to the age and life of existing wells and was so unreasonable as to require reversal by the Court. The Court recognizes that what is sometimes termed amortization is to be allowed in Ohio if it can be shown to constitute depreciation. The inclusion for depreciation charge cannot fairly exceed the finding of the minority Commissioner since his allowance was determined in light of the statutes of Ohio, the experience of the Company and the large existing

depreciation reserves. The judgment of the Court does not, however, necessarily limit the Company to that inclusion.

9. *Allocation.* The legislative policy in Ohio, under the home rule provisions of the Ohio Constitution, make the municipality an entity for the purpose of public utility rate determination. The facts and law require a method of allocation recognizing distance of transmission of gas and load factor or usage in order that no city as a unit may be called upon to pay a higher rate than that to which its location and demand entitle it. The Company refused to give effect to these controlling elements. The Court necessarily reversed the Commission and properly sustained the method presented by the City giving required effect to distance and load factor.

10. *The Cost to Ohio Fuel of Gas Purchased.* The average price paid by Ohio Fuel to independent producers in Ohio for about one-third of the gas which it delivers is 15 cents plus per M c. f.

Another third of the gas delivered by Ohio Fuel is purchased from United. The fair price for this gas, later delivered to the Columbus Company, is the amount found by the minority Commissioner and approved by the Court. This must be governed by Ohio law since the primary question to be determined is the proper charge to the operating expenses of the local distribution company.

11. *Contracts Between Related Companies.* The companies involved herein are all commonly owned. The contracts which are alleged to have been impaired are

not arm's-length contracts and are shown by the evidence to be unreasonable and unfair. Under the circumstances it was the duty of the Commission and Court to look beyond the contracts and determine the reasonableness of inter-company charges.

12. *Other Alleged Errors.* No summary required.

13. *Due Process.* The appellant was accorded full, fair and complete administrative and judicial inquiry. The Record was carefully reviewed and an independent judgment was exercised on the law and facts.

ARGUMENT.

I.

THE COLUMBUS GAS AND FUEL COMPANY.

In reproducing the properties of the Columbus Company the inventory quantities, unit prices and per cent. of depreciation presented and claimed by the Company itself were all allowed and used by the Commission, excepting only labor performance on pipe lines and inclusion of the holder. The Supreme Court of Ohio did not alter the unanimous findings of the Commission in these matters. It is perhaps unnecessary to repeat that the entire Commission and Court are in substantial accord as to the fair cost for distribution.

I. Labor Performance.

The appellant, under Assignment of Error 5 (w), protests the labor performance used by the Commission in determining the cost of reproduction of the property of The Columbus Gas and Fuel Company.

Excepting as to labor the Commission adopted the unit costs claimed by the appellant.

It is the contention of the City that in reproducing mains and services the Columbus Company persistently underestimated the performance of labor in trenching operations and laying and joining pipe. The average performance used by the Company for excavation, back-

filling and tamping of trenches for gas pipe was 2.58 cubic yards per man day of 9 hours. An attempt was made to support this low estimate by showing observation by employees of the Columbus Company of labor performance on incomparable projects, small installations and piecemeal construction by other utility companies in and about the City of Columbus. The Columbus Company at all times ignored the difference between wholesale construction such as must be contemplated in the reproduction of a plant of the size of the Columbus Company and it also completely disregarded its own experience. (R., 2498-2500.) Under these circumstances it is not to be wondered that the Commission did not accept the estimate of the appellant.

For example one of the projects chosen by the Company as proof of proper labor performance for laying gas mains was about 1½ miles of 16 inch cast-iron water main construction which was being installed by the city water works department where large heavy pipe was laid to an average depth of 5 feet. (R., 307-310.) As was said by Kellogg, witness for the City, who has had 21 years outside construction experience in the City of Columbus, during which time he has supervised some 325 miles of pipe laying in the streets of Columbus, the work on the job referred to by the Columbus Company was done by men hired because their families were on charity. Welfare and not fitness prompted their employment. (R., 2509, 2510.) This work is in no way comparable to the laying of 2 inch to 6 inch gas pipe to a depth of 30 inches in mass or wholesale construction

with men properly chosen for the purpose. How could the Commission accept such contentions?

Counsel for the Company attempted to prove that Burgess, practical engineer-contractor who was a witness for the City, (R., 451, 452), in stating he had observed the gang organizations on the water mains job was necessarily figuring on a similar labor performance for gas pipe laying, but, upon cross-examination he testified that the gang set-ups were all he investigated, that the organization coincided with his judgment and that he gave no heed to their performance. He knew the City was keeping men employed and making no attempt to secure rapid performance. (R., 464-467.) No one will doubt that the labor performance on water main laying, even with good workmen, is bound to be considerably lower than for gas mains under similar conditions. (R., 2489.)

There is nothing in the Record to show that good average performance should not be assumed in this case. No unusual soil conditions exist in Columbus, excavation is comparatively easy and the average trench for gas pipe is only about 30 inches in depth. (R., 848, 2482.)

Kellogg testified that a proper performance for excavation, backfill and tamping for gas lines in the City is about 3.5 cubic yards per man day. (R., 2510.) Allensworth, who has been acquainted with appellant's plant for many years, (R., 366), used 3 cubic yards. (R., 2488, 3114-3116.) He also presented complete study and estimates of proper performance in laying, jointing and testing pipes. (R., 3114, 3119.) The performance used

by Burgess for this work is in substantial agreement with the evidence presented by Allensworth. (R., 3129-3138, 847-881.)

There is no truth in the assertion that the labor rates allowed for the construction of these companies were founded upon trend or depression wages. They were founded upon the prevailing wage rates in this area for this kind of construction as of December 31, 1929. (R., 2488, 849.) The statement for the Company to the contrary has no basis in fact.

There is abundant evidence in the Record to support both the labor performance and wage rate used unanimously by the Commission and approved by the Court.

Indeed the Record shows that the actual cost to the Columbus Company of excavating, laying and joining mains in the City of Columbus in 1929 was less than the cost estimated and used by the City. The average size of the mains in the Columbus system is 4 inches. It is undisputed that during the year 1929 the Company laid in the streets of Columbus and contiguous suburbs a total of 14,942 feet of 4 inch mains in jobs of 350 feet or better. The records of the Company show that the total labor cost of laying these 4 inch mains was 30.35 cents per foot. The unit labor cost comparable used by the City is 30.716 cents per foot. (R., 2490, 5920.) The actual experience of the Company thus proves the labor cost—including performance—used by the City.

The majority Commission, in dealing with this subject, said:

> "It might, however, be stated briefly that the entire Commission is in substantial accord in accepting

the material costs applied by the company and the labor costs and labor performance set up by the City." (R., 171.)

We submit that the finding of the Commission as to labor performance and wages was proper and that the Supreme Court of Ohio, considering the Record, had no reason to disturb it.

II. The Gas Holder.

Under Assignment of Error 5 (x) it is alleged that confiscation results from no allowance in the value of the property of The Columbus Gas and Fuel Company for a holder station and equipment owned and used in the distribution of natural gas valued at $167,710.00.

The natural gas company began operating in the City of Columbus in 1890 and several years later it bought out, or consolidated, the old artificial gas company which had a holder attached to its mains. Indeed for some time after the consolidation the two systems were separately operated by the same company. But the demand for artificial gas was slowly but surely destroyed by the popularity of natural gas and finally the artificial plant was abandoned.

Desiring to save for capital account, and incidentally for rate controversies, all available property the natural gas companies pretended to utilize this old holder which had been constructed solely for artificial gas and which never could have any used or useful relationship with natural gas operation.

The City demonstrated beyond doubt the fact that the inclusion of the gas holder in the used and useful property of the Columbus Company is a mere sham and a pretense.

The majority of the Commission found:

> "That the valuation placed upon the gas holder and the lands upon which it is situated should be eliminated for the reason that this holder, originally designed to furnish pressure for the distribution of artificial gas has been infrequently used in the course of the years it has been attached to the natural gas mains and that if a natural gas distribution system would be reproduced the holder would have no place in the distribution of gas which comes to the gate at a pressure higher than can be furnished by the holder and that the contents of this holder, if called upon to furnish an emergency supply, would be inconsequential; as a storage tank it is useless and as a stabilizer it has no value and as a pressure producer it is without effect. It is manifest that as far as the distribution of natural gas in the City is concerned, it is a useless appendage and should be excluded from the valuation." (R., 171.)

Commissioner Bricker, in the minority opinion, thus discussed the holder:

> "An item of the difference in valuation by the City and Company is due to the exclusion in the City's inventory of lots 32 and 35 at Spruce street and Pennsylvania avenue, which constitute a site for a gas holder,—the Company having valued such property at $18,700.00. The City does not dispute the value, but does raise the question that the property is not used and useful. This brings us to the investigation of the utility of a gas holder, which was constructed for the distribution of artificial gas. The same item appears in Accounts 233—Gas Receivers and District Regulators,—where the Company's

valuation is $176,260.00 and the City's valuation is $30,095.00 a difference of $146,165.00. This difference is due to the exclusion in the city's valuation of the gas holder and the pertinent equipment located upon the land above referred to, the value of which has been excluded by the City under Account No. 228.

* * * * * * * * * * * * * * *

It is developed that this holder, originally designed to furnish pressure for the distribution of artificial gas, has been infrequently used in the course of the years it has been attached to the natural gas mains. It was further disclosed that were a natural gas distribution system to be now reproduced, this holder would have no place in the distribution of the gas which comes to the gate at a pressure higher than could be furnished by the gas holder and that the contents of this holder, if called upon to furnish an emergency supply, in case of any disturbance of the natural pressure or any breakage of the transportation mains would furnish an inconsequential amount of gas.

As a storage tank it is useless and as a stabilizer it has no value and as a pressure producer it is without effect. It is manifest that as far as the distribution of the natural gas within the City is concerned, it is a useless appendage. It should be excluded from the valuation." (R., 207, 208.)

The entire Commission thus agreed that the holder is no longer required in the rendering of gas service in the City of Columbus and that it should be deducted in estimating the reproduction cost of the gas company's property.

The Court found no cause for interfering with this factual finding.

The testimony of the various witnesses for the Columbus Company relative to the gas holder cannot be recon-

ciled. Neither can the ignorance which they manifest be conceived on the part of those who should be familiar with the operation of such a device were it really used and useful in the system. Welker, the chief engineer, exhibited a woeful lack of knowledge upon cross-examination. He was asked,

> "Well, do the Company records show when and to what extent it was called upon to assist?"

and his answer was:

> "I do not believe that there is a Company record, though the operating man might know. It is my opinion that the holder is what they call 'floating on the line' carrying storage most of the time when there should be or could be a call for the holder use." (R., 2511.)

He further testified as follows:

> "Q. Of course, the controversy is whether it is used and useful, and you have determined that it is both used and useful? A. I have, Mr. Butler. I know that. I see a welder spending a good deal of money on certain repair work for the purpose of keeping it in good use and useful operating condition.
>
> "Q. And the fact that it might not have been called upon for many years would not influence your judgment? A. It would not." (R., 2511.)

Such testimony was, of course, accorded no weight.

The Columbus Company's chief witness, Professor Demorest, who was supposed to know all about gas holders and who really knew very little, also insisted that this gas holder was only a part of a "floating line" alternately filling or emptying as the pressure on the

outside distribution lines increased or decreased. (R., 2518, 2519.)

Welker and Demorest apparently believed that the holder was a reservoir "floating on the line" but Strickler, former superintendent of the Company, disillusioned them on direct examination when he was asked why such a stabilizer of pressure is required. His reply was that the holder is not used as a stabilizer and that the gas from the holder is driven into the mains by a blower operated by an electric motor. (R., 2515, 2519, 2520.)

Allensworth, who made an inspection of the holder for the City, also testified that the gas has to be pumped out of the holder and does not "float on the line." (R., 2534, 2535.)

Clearly the testimony of Professor Demorest as to the usefulness of the holder was based upon a misconception of its connection with the system. It might be useful functioning as he conceived it but this holder does not and cannot operate in this system in that way. It is not needed and cannot be used so as to make it useful.

Indeed the evidence presented by the Columbus Company's own witness very definitely established the admission that if the holder is not a reservoir floating on the line there is no use in maintaining it. Professor Demorest so stated under cross-examination. (R., 2519.)

The evidence shows that holders are rarely designed or constructed as a part of natural gas distribution systems. They are usually a part of the equipment of artificial plants but are only an impediment when incorporated into a system where gas is delivered under a high

pressure from large compressor stations and where there is the problem of cutting down pressure between the City gates and the burner tips. (R., 2531, 2535.)

The engineer for the City testified that in reproducing the properties of the Columbus Company today he would not reconstruct a holder of this sort and that it is of no use as it now exists. (R., 2530.)

Phillips, a witness for the Company, stated that the pressure in Ohio Fuel transmission lines in the vicinity of Columbus had not dropped below 50 pounds for two or three years. (R., 2520, 2521.) Later, realizing the effect of this testimony was to demonstrate the lack of need for a holder in Columbus, he said the pressure might drop below 50 pounds but if so it would be under abnormal conditions. (R., 2521.) He was then asked for the recording pressure charts at the City gate or point which Ohio Fuel turns gas over to the Columbus Company and he replied, "Yes, we have recording pressure charts." He further said, "Yes, I think we can arrange to get them for you." (R., 2521, 2522.) It is significant, however, that such pressure charts were never produced.

The testimony disclosed that the Federal Gas Company, a sister plant of the Columbus Company, operating a natural gas distribution plant within the City, and a part of the Columbia System, has never had a gas holder attached to any part of its system. (R., 2531.)

The Columbus Company contends that the holder is used to assist the distribution system in meeting extraordinary demands, but the evidence shows that there have been periods of several years when it was not used,

although it is well known that during some of those years Columbus experienced protracted cold spells. Strickler testified in 1925 that it had not been used for two or three years and he further stated that gas has been received more uniformly at the gate since 1925 than before that time which accounts for the non-use of the holder. (R., 2522, 2523.)

The holder tank has had little or no gas pumped from it for years except for an hour or two on a few days in winter. The Columbus Company produced some pressure charts, which were not offered in evidence, purporting to reflect the effect of gas injected from the holder into the main. The City's witness, who made a careful inspection of them, stated that on the infrequent occasions when gas was pumped from the holder into the distribution mains in the limited area affected the pressure shot up to a point beyond the requirements of good service, and moreover, that these records did not show any lack of pressure in the distribution system at the time the pumps were started. (R., 2532, 2533.)

It follows from these circumstances that the gas pressure within the City of Columbus was such at all times that the pumping of gas from the holder was unnecessary and that the infrequent discharge of gas from the tank into the system was only for the purpose of creating the appearance of a used and useful appurtenance, which was answered and refuted by the charts themselves. It is apparently impossible to adjust the pressure at the regulator stations so as to overcome the effect of gas being pumped from the holder. Practically all of the

regulators in this system are automatic and excess gas from the holder simply boosts the pressure in a small sector surrounding it above that required at the consumers' meters.

Strickler fully discredited the necessity of a holder when he testified that deficiencies in supply are taken care of by laying new low pressure feeder lines from the high pressure transmission lines of Ohio Fuel. (R., 2524, 2525.) This means that a steady pressure is maintained by the Columbus Company direct from Ohio Fuel compressor stations through intermediate regulators and feeder lines and that a gas holder is without utility and hence not used and useful in supplying gas to the City of Columbus.

The Record in this case contains many self-serving statements for the Columbus Company that it has spent large sums of money in perfecting its pressure facilities in the City by the construction of new auxiliary lines and connections.

The City had no desire to eliminate from this valuation any properties actually used and useful, but it vigorously objected to paying a return upon something that is utterly useless, something that should never have been a part of the system, something that would not have been in the system except as an inherited relic from an old artificial gas plant, something that should have been torn down and forgotten years ago. The Record fully supports this position.

This matter is not a question of law. It is one of fact. Does this holder have utility and is it actually used and

useful? If it is not, then under the statute and the law it was the duty of the Commission to exclude it.

The statutes of Ohio provide that actually used and useful property only may be included in a rate base. G. C. 614-46, Appendix.

In a New York case wherein the rate to be charged for artificial gas was being considered by the Commission a holder which had been practically abandoned was excluded from the rate base. The action of the Commission was affirmed by the Superior Court. It was held:

> "Relative to reasonable rate for gas, property previously used for a holder, but practically abandoned as such, held not chargeable as gas operating capital."
>
> 186 N. Y. S., 541.

It is a well settled principle of law that a utility may include in a rate base only property presently used and useful in the public service.

In the recent case of **Los Angeles Gas & Electric Corp. v. Railroad Commission of Calif.**, 289 U. S., 287, 311; 77 L. Ed., 820, 53 S. Ct., 637, in discussing the elimination of part of a stand-by gas plant which was included in the claimed rate base of a natural gas company the Court said:

> "* * * Whatever may be said of the propriety of including this entire plant in a valuation based on historical cost, in the light of prudent investment, we perceive no reason for embracing unnecessary facilities in an estimate of cost of reproduction. In a new construction under present conditions it does not appear that such an extensive manufacturing plant would be established, and the finding of the

> District Court is amply sustained that if the manufacturing facilities no longer needed had been eliminated, the fair value base would have been reduced by about $3,000,000. * * *"

The case is directly in point and the principle announced applies with peculiar force to the matter in question.

The gas holder and its appurtenances were, therefore, properly excluded from the rate base.

III. Cost of Financing.

The Columbus Company says that the failure to allow anything for cost of financing to itself, Assigned Error 5 (z), or to the Ohio Fuel, Assigned Error 5 (g),—in considering the proper cost of gas—constitutes confiscation. We find it convenient to dispose of these assignments at one time.

The claims of the Company for this item, only theoretical approximations, amount to about $350,000.00 for the Columbus Company and $3,199,876.00 for Ohio Fuel.

An attempt was made to prove that an allowance of from 4 to 7 per cent. of the reproduction value of these properties as of December 31, 1929, should be made but no actual experience of the companies was presented. The testimony concerned merely theoretical and hypothetical costs and fees for financing and brokerage. The witnesses referred to are Arthur S. Dewing, Harvard University professor, who says he has been "operating utilities since approximately 1915," (R., 336). F. C. Ham-

ilton, a member of the executive committee of Henry L. Doherty and Company, (R., 338), and B. L. Wheeler of Ford, Bacon and Davis, (R., 334.) Much of their testimony will be found on pages 2735 to 2765 of the Record.

The Columbus Company, well knowing the frailties of the cost of financing, bond discounts and brokerage, presented a unique but still an impossible plant. It would split bond discount and brokerage, treating the former as "merely a function of the rate of interest and dependent entirely on the option of the Company as to what they desire to have the coupon rate on the securities to be" (testimony of Dewing, R., 2735) but as to the latter including an arbitrary allowance for brokerage costs as capitalizable and hence a part of the fair value of the plant.

The contention that there should be a different treatment of that part of the discount which is received by the ultimate purchaser of securities and that part which represents the return to the financier for handling the issue, has been considered and disposed of in Wisconsin where it was held that such a theory is indefensible; that there is no warrant for attempting to differentiate between that part of the discount on an issue of securities which is received by the purchaser and that part which represents the return to the banker for handling the issue; that, if any part of the discount is to be treated as a capital charge, the ultimate effect is of the same nature as it would be if the entire discount were added to the property account though different in amount. **Re Wisconsin-Minnesota Light & Power Co.** (Wis.) P. U. R.,

1920D, 428. The Commission made the following pertinent comment:

> "If the discount on securities issued is added to the property account, each refinancing which involves a discount adds to that account even though the property may not be growing. As time goes on the unavoidable result of this is to place in the property account an element of discount for each refinancing until the element of capitalized discount may be altogether out of proportion to the actual plant and equipment. The fact that only a part of the discount would be treated as a capital charge does not alter the principle."

This was at best only a left-handed attempt to gain recognition for cost of financing; it was the same old wolf but in sheep's clothing. There exists no sound reason for differentiating between discount and brokerage fee. Both should be excluded from the rate base.

These matters are so conjectural, indefinite and uncertain that even complainant's own witnesses were confused and at cross-purposes in their testimony. (R., 2754, 2616.)

The majority and minority Commissioners both ruled against any allowance for cost of financing. The majority said:

> "Another point of difference between the Company and the City is whether or not the Commission should allow as part of the base rate the cost of financing, the contention being centered upon the question as to what should be regarded as the cost of financing and what as a discount upon securities sold. The Statutes of Ohio do not contemplate the cost of gathering together the money necessary to construct the public utility. When the Commission

> is directed to ascertain the cost of building a given plant the Statute has reference to the actual money to be expended for that purpose and does not contemplate that there should be an allowance for gathering together the money." (R., 164.)

The Commission in disallowing the Company's claims simply followed the almost universal rule. It is possible to cite well nigh innumerable cases to support the disallowance but we deem it unnecessary to do so. Both the Ohio Court and the Supreme Court of the United States have very concisely stated the law within recent years, and after all these are the jurisdictions with which we are chiefly concerned.

The United States Supreme Court held in **Galveston Electric Co. v. City of Galveston**, 258 U. S., 388, 42 S. Ct., 351, 66 L. Ed., 678, that:

> "hypothetical brokerage fees need not be included in the present base value of the property of a street railway system used in the public service, for the purpose of determining whether a rate fixed by municipal ordinance is confiscatory."

On page 397 of the Court's opinion is this language:

> "The other item included by the Master determining base value, but disallowed by the Court, is $67,078 for brokerage fees. There is no evidence that any sum was in fact paid as brokerage, and there was included, as above shown, the sum of $73,281 for organization and business management in calculating the historical reproduction cost. The finding of the Master rests upon testimony that bankers customarily get, in some form, compensation equal to 4 per cent. on the money procured by them for such enterprises. But compensation for bankers'

services is often paid in the lessened price at which they take the Company's securities, and is thus represented in the higher rate of interest or dividend paid on the money actually received by the Company as capital. The reason given by the Master for including the allowance for an assumed brokerage fee is that a brokerage fee is 'a normal incident of large industrial investments and has not been amortized', since 'the record shows that the plant has been operated at a loss.' If base value were to be fixed by the money expended, brokerage fees actually paid might, with propriety, be included, as are taxes paid pending construction. But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial. We cannot say that the Court erred in refusing to include in base value an allowance for hypothetical brokers' fees."

A recent expression of the Supreme Court of Ohio on this subject is found in **Portsmouth Gas Company v. Public Utilities Commission of Ohio**, 119 O. S. 24, at page 32, also 162 N. E. 106. The following is from the concurring opinion:

"An allowance is also demanded for the cost of capital for reconstruction. Such capital is not now being raised, and, when raised, over 50 years ago, no doubt its cost was defrayed from the rates paid by the public. The situation which obtains when a utility is a producing company and has been but recently organized is entirely different from the situation which obtains when the utility is a distributing company only, not a producing company, and has been operating for a long period of years. The actual expense of preliminary financing has by this time been absorbed in the prices paid for the gas.

An allowance for hypothetical brokerage fees based on the percentage customarily obtained by

bankers for financing such enterprises should not be allowed. **Galveston Electric Co. v. City of Galveston,** 258 U. S. 388; 42 S. Ct. 351; 66 L. Ed. 678.

The fair value of the plant should not be estimated upon a basis of impecuniosity and exactions, but upon the theory, if used, of reconstruction, by those financially able to build the plant, paying reasonable prices therefor. **City of Minneapolis v. Rand** (C. C. A.), 285 F. 818."

The Supreme Court of the United States has had occasion to consider this same subject in two recent cases. In **Wabash Valley Electric Company v. Young, et al.,** 287 U. S. 488, 500, 53 S. Ct. 234, 77 L. Ed. 447, it was found:

"Complaint is made that in determining the value of the Martinsville property no allowance was made for cost of financing. As the Court below, however, pointed out, there was no evidence that such cost was incurred, or that it necessarily would be incurred in the event of reconstruction. This is also in accordance with the findings of the Master. We see no reason to interfere. See **Vincennes Water Supply Co. v. Public Service Commission,** 34 F. (2d), 5, 9."

And in **Los Angeles Gas and Electric Corporation v. Railroad Commission,** 289 U. S. 287, 310, 77 L. Ed., 1180, it was decided that in estimating reproduction costs for the purpose of ascertaining the fair value of the property of a public utility to serve as a rate base items for cost of financing and for promoters' remuneration are properly excluded as too conjectural.

In light of the law and the facts, we are at a loss to understand how any serious contentions can be made in this matter by the Columbus Company. The language

used in the foregoing cases should leave no doubt that appellant's claims for cost of financing were properly disallowed.

IV. Going Concern Value

Assignment of Error 5 (y) is an allegation of error on the ground of no allowance to the Columbus Company for going concern value. Assignment of Error 5 (h) sets forth a similar claim relative to the treatment of Ohio Fuel and Assignment of Error 5 (v) includes a like charge concerning the United. These assignments very largely have a common answer and we shall here dispose of them accordingly.

In arriving at the valuations of the properties involved both majority and minority Commissioners accepted the inventories presented by the appellant, employed cost of reproduction new, less depreciation, using current unit prices as of December 31, 1929, and in addition thereto made substantial allowances for direct and undistributed overheads, working capital and current operating expenses in generous amounts.

After reproducing the plants of the Columbus Company and of the Ohio Fuel as live units, as just indicated, the Company added certain separate and specific amounts for going concern value. The amounts so claimed are, for the Columbus Company, Company Ex. No. 2, $537,340.00, (R., 2874), and Company Ex. No. 63, (Original) $740,000.00; for the Ohio Fuel, Company Ex. No. 45 (R., 2914) and No. 57, (Original) $12,000,000.00; and for the United Fuel, $7,500,000.00. (R., 2480.)

The City recognized going concern value as it actually attached to the properties of both the Columbus Company and Ohio Fuel by including it in the statement of reproduction cost new less depreciation with allowances for construction, overhead charges, working capital and operating expenses. It is obvious that if these companies were not going concerns, if they did not have customers attached, if they did not have trained personnel capable of serving their attached customers, the value of their respective properties would not be expressed in reproduction cost new less depreciation plus overheads, et cetera, as is the right of a going enterprise, but would be expressed in terms of bare bones or salvage value and no more. As was stated by Allensworth, the total valuation which the City accorded the property is not less than the actual value as a going concern. (R., 2727-2729, 2720-2726.)

It was necessary for the Commission to determine the value of all kinds and classes of property used and useful for the service and convenience of the public as of the date certain. The authority of the Commission to ascertain and report the valuation of the property is conferred by Sections 499-8 and 499-9, G. C. (Appendix.)

A hearing before the Public Utilities Commission, in the case of an appeal from a rate established by ordinance, is provided for by Section 614-44, G. C. and the facts which the Commission shall respect in making its finding as to a rate are set forth in Section 614-46, G. C. (Appendix .....) But neither here nor elsewhere do the

Ohio statutes, while providing for the reproduction value of the property of a company, expressly or impliedly recognize going concern value as an element to be separately evaluated by the Commission.

Welker, an engineer of The Columbia Engineering and Management Corporation, representing the appellant, was the only witness on going concern value who possessed any intimate knowledge of either the property or early history of the Columbus Company and he stated that he had made his allowances in an abstract manner. On cross-examination, (R., 2546), he was asked:

> "Q. Yes, and Mr. Welker, don't you know that after you have put into your reproduction cost everything that you have included you just gather up an additional thing and call it going concern value which you yourself cannot analyze; isn't that about it? A. I have added a percentage on this property as going value and I have not endeavored to analyze or itemize it."

And again, (R., 2553, 2554), under questioning of his own counsel, is this testimony:

> "Q. Mr. Welker, could you give a figure which it would cost to reproduce the going concern value of The Columbus Gas & Fuel Company? A. I could not at this time.
>
> "Q. Could you at any time? A. Study or search or investigation might be made if the data were available. I do not believe it is available."

Counsel for the Columbus Company then stated, "We have other testimony on the question," (R., 2554), but no one was ever produced who had made a concrete analysis

of early company records. The data was not "available."

Here was the chief engineer of the Gas Department of The Columbia Engineering and Management Corporation confessing that he had made a flat 10 per cent. allowance for going value, that it was a mere estimate, that he had not endeavored to analyze it or to give anything but a theoretical basis for it and that the data was not available for such an analysis.

Consider the testimony of Wheeler, of Ford, Bacon and Davis, New York, the utility's valuation experts, relative to going concern value. Of all the absurdities on the subject not one has ever equalled Company Ex. No. 57. (Original.) It ran through all the various and intricate phases of the going concern gamut and left no imaginable claim unmentioned, even though some of the elements set forth were so ridiculous that not even their author would attempt to translate them into real dollars and cents.

The summary of Wheeler's imagination for Ohio Fuel is page 3 of the said Compay Ex. No. 57:

"Elements of Going Concern Value as of June 30, 1929.

Group 1—Business Development Period.	Estimated Amount.	Percentage of Approximate Reproduction Cost New of Physical Property, Namely $115,000,000.
Interest or return unearned during business development period	$6,300,000	5.48%
Attached and trained personnel	700,000	0.61
Attached business	2,070,000	1.80

Adjustment of physical property	1,200,000	1.05
Establishment of operating record forms and development of methods and operating procedure	130,000	0.10
Group 2—Subsequent Period		
Consolidation value	4,500,000	3.91
Abandonments of property prior to adequate amortization	250,000	0.22
Refinements of methods and operating procedure	(A)	....
Total	$15,140,000	13.17%

Note: (A) No definite value assigned."

The above, it is to be understood, is only an estimate made by engineers who either knew nothing of the early history of the Company or wholly disregarded it.

Second only to Company Exhibit No. 57, as an absurdity, stands Company Exhibit No. 63, (Original), which voluminously proclaimed the elements of intangible value of the Columbus Company as outlined by Ford, Bacon and Davis. The summary of those estimates is set forth on pages 39 and 40 of the said Company Exhibit No. 63:

"Estimated Going Concern Value of The Columbus Gas & Fuel Company as of December 31, 1929.

	Estimated Amount.	Approximate Percentage of Estimated Reproduction Cost New of Physical Property, Namely, $6,292,181.
Interest or return unearned during business development period	$250,000	4.0%
Attached and trained personnel	60,000	1.0
Attached business	400,000	6.3
Adjustment of physical property	30,000	0.5
Total	$740,000	11.8%"

This table, too, is only an estimate made by engineers who ignored the history of the Columbus Company and made a vague attempt to support their claims for going concern value by referring to some sort of observations made in connection with Grove City, Ohio and Edmonton, Alberta, Canada.

Contradictory Evidence.

Keeping in mind their abstract claims for going concern value, let us glimpse the general disagreement among witnesses as to the elements which make up this intangible thing.

Dewing's analysis of the subject was in full discord with Wheeler and Hamilton. On cross-examination he testified that the three elements from which he thought he could work out a dollars and cents estimate were the

"cost of attaching customers", the "cost of carrying not the losses but the cost of carrying the works during the first five years", and, third, the "cost of financing". (R., 2588, 2589.)

Dewing spoke of the "cost of attaching customers" while Wheeler testified concerning the "value of attached business". Dewing, struggling to escape the rule against recoupment of past losses, as we have seen, included in going concern value the "cost of carrying not the losses, but the cost of carrying the works during the first five years." Wheeler included an amount for "interest or return unearned during the business development period." (R., 2573.) Hamilton shied from basing his claims upon interest or return unearned during the business development period because, as he said, it "gets pretty close to the deficit method that the old Wisconsin Commission used to use and which can under particular circumstances be carried to ridiculous proceedings." (R., 2625, 2626.) The third and last element which Dewing embraces, "the cost of financing", was accepted by no other witness. In fact, as will be later noted, Hamilton completely discarded it, saying, "No, sir; it is incurred long before there is any physical property. It has no connection with the going concern value." (R., 2616.) Dewing disposed of attached and trained personnel with the significant words, "But it is so intangible an estimate in the situation that I do not think I should attempt to form a dollars and cents estimate." (R., 2588.)

Hamilton, of Henry L. Doherty and Company, stated his conception of going concern value but it is a general one and is apparently the formula which he would apply to any utility plant as a specific over-all amount for going value. He made no attempt to connect his conceived elements with the history of the plants under consideration. (R., 2614.) His further testimony was enlightening, especially to Dewing and Wheeler, because he stated that neither cost of financing nor interest or return unearned during the business development period are to be considered as a part of going concern value. He said that in fixing this value he would simply inquire how many customers were attached and the amount of sales made to those customers. His estimation for attached business he said was about $15.00 per customer. (R., 2616, 2625, 2626.)

There is nothing in this Record to show that these expenses have not been already compensated in rates heretofore charged and collected.

When asked whether he would give the same value to those customers acquired by mandatory injunction against the Company as well as otherwise, Hamilton replied:

> "I would add for those customers, they would add, when they added them, the value, yes, irrespective of how those customers were added. They are there; they are of value; and no matter if somebody gave them to them they still have value.
>
> "Q. Do you seriously mean, Mr. Hamilton, that because of those customers obtained under those conditions you would add something to the rate base, although those people stood there knocking

and the City stood with them demanding that they be given service, and they finally got their service through a mandatory injunction of the Federal Court compelling the Company— A. Yes, I certainly would." (R., 2632.)

A mandatory injunction was actually issued against the Columbus Company by the Federal District Court in 1927, compelling it to attach many new consumers who had been clamoring for gas but had been refused service.

It is quite enough to say that such words fall of their own weight.

Interest or Return Unearned During Development.

Wheeler estimated the amount of "interest or return unearned during business development period", upon which consumers should now pay a return to the Company as $6,300,000.00 in the case of the Ohio Fuel and $250,000.00 in the case of the Columbus Company. The other witnesses did not list this item to which he attached such importance. In the first place, the estimate was a mere abstraction without any showing of any definite amount of return unearned during a business development period or any showing that the plants ever had such an experience. Secondly, the allowance necessarily embodied the principle that a utility should be allowed to capitalize early losses. This theory was rejected by the Supreme Court of the United States in **Galveston Electric Company v. Galveston**, 258 U. S. 388, supra, 394, 395.

Attached and Trained Personnel.

The item of "Attached and Trained Personnel", the cost of which has been paid out of operating expenses, was too intangible a factor for the appraisal of Dewing, (R., 2588), but Wheeler estimated its value to the Ohio Fuel at $700,000.00 and to the Columbus Company at $60,000.00. (R., 2564, 2565.) The trained personnel of these companies have been paid out of current operating income taken from customers and consumers as rates, and it is assumed that their services are rewarded in proportion to their competency. Such expenditures are always allowed as operating expenses and if set up as capital would be twice included. Personnel is now paid out of operating expenses and upon actual reproduction would not be differently treated. Neither efficient nor incompetent personnel today should in any way affect the capital value of these companies for rate making purposes. The consumer's obligation ends with the payment of a fair charge for the service received. It is the duty of the utilities to conduct their business in a competent manner without exacting additional costs for trained employees. Wheeler indulged in considerable discourse concerning the unusual value of the length of service and years of experience of the officials and employees of these companies in the gas industry. There never was any merit in the contention that such service should be carried into a rate base, but, if even a color of merit had existed, it has been obliterated by the employ-

ment in 1930 of Mr. C. I. Weaver, who was wholly without experience in the gas business, although otherwise a competent utility business executive, as vice-president and general manager of Ohio Fuel, and his further employment in 1931 as president of both Ohio Fuel and the Columbus Company. (R., 339, 340.) Experience, except for the purposes of a rate case, apparently pales into insignificance.

Adjustment of Physical Property.

"Adjustment of physical property" was not enumerated as an element of going concern value by Dewing, but Wheeler included for it an estimate of $1,200,000.00 for Ohio Fuel and $30,000.00 for the Columbus Company. Hamilton called this the cost of taking the "bugs" out of the system. (R., 2616-2620.) There is no conceivable justice in allowing anything for this item. Costs of this nature, if any, have been paid in full as operating expenses; they are included in maintenance charges and are not capitalizable.

Wheeler alone had the courage, or the stupidity, to set forth a claim for an allowance for "abandonment of property prior to adequate amortization". The amount which he estimated for Ohio Fuel was $250,000.00. He omitted it from his Columbus Company exhibit. To allow anything for this item would be placing a premium upon poor management and a recognition of the right to recoup past losses, both of which are forbidden by commissions and courts.

Merger.

Company Ex. No. 57, Original, laid great stress upon the value of the combined properties of the Logan Gas Company and Ohio Fuel. Can anyone seriously say that the consolidation of the Logan and Ohio Fuel benefitted Columbus consumers? The Logan, we are told, was short of gas. Ohio Fuel had plenty of gas and Columbus was receiving its supply from that source. The Ohio Legislature has spoken very definitely on this subject. Section 614-46, G. C., Appendix, directs that the value of all the property of a public utility actually used and useful for the convenience of the public shall be considered in rate fixing, exclusive, among other things, "of any value added thereto by reason of a monopoly or merger."

Attached Business.

"Attached business" as an element of intangible value was estimated by Wheeler to exist in the Ohio Fuel to the amount of $2,070,000.00 and in the Columbus Company to the extent of $400,000.00. This, he said, page 40, Company Ex. No. 57, Original, resulted "from the expenditure of energy and skill as well as the investment of money in developing the position of the Company in its present field of service." But not a single step was enumerated by him as necessary to secure customers that was not paid for out of operating expenses in the past or that would not be so paid if the plants were in truth rebuilt today. Any energy and skill expended was that

of the men on the pay-roll and the money invested in developments came from the rates paid by consumers. If otherwise, where is the proof? No capitalizable foundation whatever was built, or disclosed, for these enormous claims. The witness could find no financial history upon which to base them. The gas companies demand that a consumer pay an additional return because he is an attached customer, although he has no other source to which to turn for gas. What choice does he have? Regulation has been substituted for competition and surely no commission or court will permit a monopoly to earn merely because it is a monopoly. In his attempts to capitalize consumers connected with the mains of the companies, Wheeler made a weak effort to minimize the monopolistic conditions enjoyed by these subsidiary companies of the Columbia System. Surely a monopoly does really exist.

Wheeler's judgment for this item was based upon an estimated cost of reproducing a gas-minded public:

> "The Witness: I am assuming that that is to be reconstructed and that that value, that state of mind and that willingness to take the gas has to be reconstructed, *and that the* element of value inheres in the fact that there was a load of this 60,000 customers attached at the date certain; that they would have to be reattached over a period of time and their sales resistance conquered.
>
> "Chairman Geiger: Well, now, I am glad to get somebody down to that point. Let me re-state it: Your judgment of attaching business is based upon your estimate that the state of the public mind has to be reconstructed?
>
> "The Witness: On the reproduction principle, absolutely." (R., 2710, 2711.)

Dewing was asked by the Company to give a measure of the valuation of a customer which he did in amounts varying from $175.00 to $7.00 per customer, at the same time saying that he was not familiar with the Company or the appraisal of the property. (R., 2584, 2585.)

Upon direct examination Hamilton made a guess of another amount based upon what is termed an approximate cost of reproducing consumers. He named a figure of $14.00 or $15.00 per customer. (R., 2615.)

The wide discrepancy in the guesses made for this element is conclusive proof that there is no ground for it; a flight of imagination was all that these witnesses required in order to compile their estimates. Poor consumers! The more they increase in numbers the more they are called upon to pay. A consumer becomes a millstone about his own neck.

Unwarranted Claims.

Testimony such as that found in this case must have been in the mind of one authority on valuation in 1928 when the following was written:

> "As a result of these limitations one might almost say that going concern or going value in a rate case is that element of value with respect to which commissions and courts throw out all the testimony of the experts and then make their own guesses, and this disposition of the element—where it is allowed at all—seems to be inevitable for the reason that no specific method of measuring going value thus far proposed by the experts seems to redeem the subject

from a morass of hypothetical fact and fantastic conclusions."

Valuation of Public Service Corporations, Whitten-Wilcox, page 1348.

Were further proof needed of the conjectural nature of the evidence presented in this case we might refer to R., 2588, 2589, where the following dialogue took place between the Commission and Professor Dewing:

> "Q. By Chairman Geiger: Do you know, Doctor, anywhere where you could get somebody to tell us what going concern value is? We have numerous engineers here and no two of them have so far agreed. Could you refer us to somebody that is standard on that? A. To be frank with you, Your Honor, I think if you should get fifty so-called experts in here, their description and definition of going concern value would be found to constitute fifty separate definitions."

This disagreement of so-called experts is due to a disregard of the definition of going concern value as laid down by the Supreme Court of the United States and a desire and purpose on the part of those for whom they are testifying to include unwarranted amounts in the guise of going concern for rate making purposes.

This Record is an almost perfect illustration of the length to which some utilities are willing to go in order to magnify valuations and to swell returns. The testimony offered for the gas companies on this subject has been discussed in detail because we find here all of the conjecture, speculation and uncertainty of excessive going concern claims.

We do not deem it necessary to further analyze the testimony of these witnesses because it is already obvious that from its very nature their estimates should not have been accepted by the Commission or the Court and that the failure to include them is not error.

Going Concern in the United.

Counsel for the Columbus Company appear to be concerned about what the West Virginia Commission and the West Virginia Supreme Court of Appeals did in the United case in respect to going concern value.

In its original findings and decision the West Virginia Commission allowed a conventional going concern value of some 10 per cent. without any supporting detailed proof.

The case was then carried to the Supreme Court of Appeals where that Court announced that the Commission had misinterpreted the law as permitting a conventional allowance without specific proof and remanded the case with directions to the Commission to reconsider the matter "in the light of our observations on the subject". In discussing the matter the Court said that:

> "Commissions treat it as compulsory and are impatient with the concept because they can not intelligently apply it. This has resulted in allowances which were, for the most part, purely arbitrary."

The discussion concludes with this:

> "As the percentage fixed for going value by the Commission is not substantially supported by the evidence, we set it aside and advise the Commission

to take this item under consideration again, in the light of our observations on the subject." (R., 3026-3028.)

City of Charleston v. Public Service Commission, 110 W. Va. 245, 159 S. E. 38, P. U. R. 1931E, 74.

When the Commission redetermined its rates in compliance with this opinion it eliminated its separate allowance for going concern value and the rates it then put into operation were not based upon any such separate or independent allowance.

The Ohio Commission considered the United properties reproduced as of December 31, 1929 with working capital, operating expenses and also 14 per cent. overheads as allowed by the West Virginia Commission on October 3, 1931. It cannot be said that the value employed in weighing the cost of United gas was less than the value of that company's properties as a going concern.

The Action of the Ohio Commission.

It appears that opposing counsel believe they have "caught" the Commission in the use of loose expressions justifying the claim that the Commission wholly rejected the appearance of even any indirect allowance for going concern value and wholly discarded it because of its own want of merit.

The Record clearly shows that they were following the lines along which they have been disallowing separate or independent inclusions for going concern value under

similar circumstances for the reason that every possible element has been included in other allowances made by them, a practice which has often received the full and cordial approval of the Supreme Court of Ohio.

There was no disagreement between the minority and majority in disposing of this matter. Commissioner Bricker tersely stated in regard to the Columbus Company's plant that it was considered as a going concern allowing sufficient amounts for working capital, materials and supplies, and that he was therefore disallowing any amount independent of that which appears in the undistributed overheads and unit costs. (R., 209.) In the case of Ohio Fuel and United he also found that no independent allowance was necessary and summed up his position as follows:

> "Both the rule of reason and the rule of law, generally, as well as the facts of this particular case, dictate our finding that no separate allowance for going value shall be made." (R., 202.)

The key of the discussion of the majority is this:

> "The witnesses as to this elusive element of value had each a separate formula by which he estimated the amount as to the physical value of the property as 'going concern' value." (R., 162.)
>
> * * * * * * * * * * * * *
>
> "As we have before had occasion to state, if there was any definite cost to the Company in doing those things which are so ingeniously developed as being the possible element of cost in the reproduction of the property, we would be inclined to allow them as a proper element of value, but we are not impressed with the fact that a going concern value amounting in the aggregate to millions of dollars

> can be built up on a theory that expenses are to be incurred after the property has been reproduced which were not, as a matter of fact, incurred in the original construction of the property." (R., 162, 163.)

They then conclude by citing a number of cases decided by the Supreme Court of Ohio which clearly show that they were proceeding along the well settled lines theretofore adopted by the Commission and fully approved by the Court. (R., 163.)

The Ohio Supreme Court, in view of the valuations and allowances employed by the Commission in dealing with the properties involved herein, affirmed the Commission's action in this matter. It said:

> "The members of the commission were unanimous in the disallowance of going concern value as a separate item. In a number of cases this court has affirmed such action by the commission. City of Cincinnati v. Public Utilities Commission, 113 Ohio St. 259, 148 N. E. 817; Hardin-Wyandot Lighting Co. v. Public Utilities Commission, 118 Ohio St. 592, 162 N. E. 262; Logan Gas Co. v. Public Utilities Commission, 121 Ohio St. 507, 169 N. E. 575. Similarly the Supreme Court of the United States in a recent case, Los Angeles Gas & Electric Corporation v. Railroad Commission of California, supra, refused a going value claim of approximately nine million dollars.
>
> This court is of the opinion that in the instant case this refusal was proper." (R., 63-64.)

Authorities.

The decisions of the Supreme Court of Ohio have been clear and definite leaving no room for misunderstanding. They follow the rule of the Supreme Court of the United States so that the opinions of these two courts may well be considered together.

In **Cincinnati and Suburban Bell Telephone Company v. Public Utilities Commission of Ohio**, 113 O. S. 259, 148 N. E. 817, the Court, at page 295, et seq., said:

"In its final order, while the Commission does not specifically refer to the item of going value, we are of the opinion that this was considered by it and properly included in the item denominated 'overheads', amounting to $1,846,451. Included in that amount was an allowance for 'engineering, administrative and legal expenses, liability insurance, taxes and interest during construction.' All of these entered into the development of the utility's property and gave it an added value which was not represented in the valuation of the physical property. It is one of the methods followed by the Commission, justified by the principles enunciated in Federal cases.

'Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. * * * When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful op-

> eration, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves.' **Des Moines Gas Co. v. City of Des Moines**, 238 U. S. 153, 165-171, 35 S. Ct., 811, 815, 59 L. Ed., 1244."

The Court cited **City of Houston v. Southwestern Bell Telephone Co.**, 259 U. S. 318, 66 L. Ed. 961, 42 S. Ct. 486, and **Galveston Electric Company v. Galveston**, 258 U. S. 388, 66 L. Ed. 678, 42 S. Ct. 351.

It will be noted that the basic authority for our Ohio rule is the Supreme Court of the United States in **Des Moines Gas Company v. City of Des Moines**, supra, where the Court distinguished between good will and going value, delivering a death blow to the former, while approving going value but without the necessity for a separate allowance. In the opinion Mr. Justice Day said:

> "That 'good will' in the sense in which that term is generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of valuation for the purpose of rate-making of public service corporations of this character, was established in Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 53 L. ed. 382, 399, 48 L. R. A. (N. S.), 1134, 29 Sup. Ct. 192, 15 Ann. Cas. 1034. 'Going value', or 'going concern value', i. e., the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are

collected in Whitten on 'Valuation of Public Service Corporations', 550-569, and the supplement to the same work, 1350-1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the properety upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the master sufficiently include this element in determining the value of the property of this company for rate-making purposes?''

Mr. Justice Day then made the observation that has been quoted in **Cincinnati and Suburban Bell Telephone Co. v. Public Utilities Commission**, supra, and summed up the position of the Court with this statement:

> ''When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves, and the appellant's contention in this behalf is not sustained.''

Ohio has continued to follow the rule established in **Des Moines Gas Co. v. City of Des Moines**, supra, and other cases with which this Court is familiar.

In the case of **The Hardin-Wyandot Lighting Com-**

pany v. Public Utilities Commission, 118 O. S. 592, 162 N. E. 262, the Commission had not made a separate specific allowance for going concern value but its finding was upheld by the Ohio Court which held that a reversal of the order was not required unless the total valuation appears to be less than its value as a going concern. The Court again completely reviewed the decision of the Supreme Court of the United States on the subject up to that time. In **The Portsmouth Gas Company v. Public Utilities Commission of Ohio**, 119 O. S. 24, 162 N. E. 106, the value of the property used was reproduction cost new less depreciation as of the date certain plus overheads and other customary allowances. The Gas Company urged that the Commission erred in making no specific allowance for going concern value. The Court, citing **City of Cincinnati v. Public Utilities Commission of Ohio**, supra, and **Hardin-Wyandot Lighting Co. v. Public Utilities Commission of Ohio**, supra, affirmed the Commission's finding and order. It was said that the values assigned by the Commission were sufficient to include and did, in fact, recognize going concern value. In a comparatively late case, **The Logan Gas Company v. Public Utilities Commission of Ohio**, 121 O. S. 507, 169 N. E. 575, the Court affirmed the finding and order of the Commission which reproduced the properties of the Company, less depreciation, as of the proper date certain, with allowances for overheads but without any specific separate inclusion for going concern value as such.

In **Los Angeles Gas and Electric Corporation v. Railroad Commission of California**, 289 U. S. 287, pp. 313-

319, supra, this Court, in an opinion by Mr. Chief Justice Hughes, has so thoroughly and completely analyzed and discussed the decisions of the Supreme Court of the United States on the subject of going value that it would be presumptious on our part to here further discuss them. This opinion is still fresh in the minds of the members of the Court.

The position of the Commission, the high Court of Ohio, and the City in this case is consistent with the principles enunciated in the Los Angeles case, supra. Many questions presented here find a parallel in that case. We feel that their determination is decisive.

We know that this Court will inquire first, as to the actual scope and effect of the legislative determination in relation to the value of the property as that of an integrated and established enterprise, and second, whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation. These questions we have fully answered in the foregoing argument. In the instant case, as in the Los Angeles case, supra, it is urged that the Commission declined to allow any amount for going value and here, as there, it is true that the Commission refused to admit the assumptions underlying the Company's claims for the amounts of $740,000.00, $12,000,000:00 and $7,500,000.00 for the Columbus, Ohio Fuel and United Companies respectively, as going value. It did, however, reproduce the properties as of December 31, 1929 for a succeeding 5 year ordinance period with liberal

allowances for overheads, materials and supplies, working capital and operating expenses, using practically the Company's claimed inventory quantities and unit prices. The Columbus Company and its predecessors have been in business for more than 40 years, the Ohio Fuel and United are old companies, and the greater parts of all these properties were constructed in times when costs were far lower than they were in 1929. It certainly cannot be said that live, active plants were not thus assumed or that the historical cost of the properties would even approach the fair value figures actually used.

The fact that what was actually going concern value in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element.

The next and final question, then, is whether the Columbus Company has presented evidence, sufficiently convincing, that greater amounts for going value should have been included by the Commission than were substantially allowed. The evidence offered has been discussed at some length and we maintain that it is just as speculative and uncertain as was that rejected by the California Commission and commented upon by this Court in **Los Angeles Gas and Electric Corporation v. Railroad Commission**, supra.

We earnestly submit that the result of the treatment of going concern value by the Commission and the Court is such that the Columbus Company, either as a distributing company or a purchaser of gas, has no grounds to complain of prejudicial action.

V. Overheads.

The Columbus Company, in Assignment of Error 5 (aa), charges insufficient allowance in the value of its property for undistributed construction expenditures otherwise known as general overheads. A like claim is made in Assignment of Error 5 (i) relative to the consideration of the value of Ohio Fuel. We shall here answer both of these assignments.

The amount of general overheads requested by the Columbus Company was $575,416.00, (R., 2874), the figure claimed by the City $414,539.00, (R., 3121), and the amount allowed by both majority and minority Commissioners and not disturbed by the Court was $436,405.00. (R., 182, 220.)

For Ohio Fuel the amount contended for by the Company was $10,468,759.00, (R., 2914), and the City's witnesses testified to a figure of $7,960,962.00. (R., 1740.) The majority Commission included in its finding $7,928,820.00, (R., 180), and the minority Commissioner fixed the amount at $7,803,083.00. (R., 218.) The Supreme Court of Ohio reversed the majority and held that the findings of the minority upon this question were reasonable and lawful.

The figures set forth hereinabove are final or depreciated.

General overheads, or undistributed construction expenditures, as used in this case, are blanket allowances that are made in addition to the direct overheads which

are included as a part of the unit cost of the public utility properties. Being theoretical largely they are arrived at by estimation.

For very well known reasons companies rarely fail to make large demands for these things and the amounts insisted on by the gas utilities in this case occasion no surprise. But Ohio is not alone in this experience; Judge Rose had discovered a similar tendency on the part of certain companies in West Virginia when he remarked:

> "There is no possible question that in almost all of these rate cases the overhead charges included in the estimated cost of reproduction greatly exceed any sum that the utility actually paid out for such purpose. A large and widely distributed plant is ordinarily a growth extending over many years. Its property is managed by its officers and its construction is financed in installments. The large overheads estimated by the experts are simply not incurred."

United Fuel Gas Company v. Public Service Commission, 14 Fed. (2nd), 209, page 214.

The amounts allowed by the Commission for overheads in this case are not only liberal but are unusually high as we shall prove.

The Commissioners were virtually in agreement concerning the amounts of allowances for this item but the Court approved the finding of Commissioner Bricker. He recognized the inclusion of all necessary elements. In his opinion in respect to Ohio Fuel he said:

> "This allowance is a judgment figure based upon engineering experience and there is presented to this Commission in the Record a wide variance of opin-

ion as among the engineers of the City and the Company. These figures are in all cases based upon estimates rather than actual experience. The Company has applied different figures to production and transmission systems and the general property while the City has taken an over all figure, eliminating lands. In the Company's set up we find 4% allowance for the cost of financing upon all the property and 7% for interest during construction. Immediately it is apparent that the reproduction method of valuation is highly theoretical. There has been wide variance even in the decision of the Supreme Court of the United States from the strict reproduction theory which if carried to the ultimate would include items of overhead, theoretically, which never have been and likely never would be expended in the actual construction of the plant.

"These various plants which go to make up The Ohio Fuel property were not constructed as producing systems, transmission systems and general property but as a unit and have all been brought together as component parts of one property. It is true that The Ohio Fuel Gas Company in some towns sets up a gate rate and in other municipalities actually renders the service direct to the consumers, but the Commission will apply the general overhead charges to all property of The Ohio Fuel Company based upon the valuation fixed herein. This will include land and right-of-way but excludes working capital and leaseholds and is divided as follows:

Engineering and superintendence during construction	2.5%
Organization	1.0%
Administrative expenses during construction	1.2%
Law expenses, injuries and damages and taxes during construction	1.8%
Interest during construction	6.0%

Other expenses which include omissions and contingencies 1.5%

Total 14.0%

"It appears from the Record that an allowance for omissions and contingencies is made by the Company also in its direct overheads and therefore enters into its unit costs, but no deduction has been made to take care of this duplicate charge by the Company." (R., 197, 198.)

Dealing with the Columbus Company, he said:

"There has heretofore in the case of The Ohio Fuel Gas Company been applied for undistributed construction expenditures the figure of 14% on the valuation fixed by the Commission. We are here dealing with a smaller plant, the construction of which would not take the time necessary for the reconstruction of the Ohio Fuel Gas system thereby lessening charges for interest and taxes, and I am of the opinion that these accounts known as undistributed construction cost and omissions and contingencies should be 12½% of the valuation found by the Commission of the physical property." (R., 209.)

In its opinion the Supreme Court of Ohio used the following language:

"Upon the allowances made for taxes and general and direct overheads, we have given careful consideration to the opinion of both the majority and the minority of the Public Utilities Commission and have reached the conclusion, **upon the entire record,** that while there is no great differences between the majority and minority findings as to values and percentages taken, the figures presented and estimates made by the minority report are fair and just.

"We are not unmindful of the economic conditions which now exist and which have existed since the beginning of this rate case and prior thereto. It is our conclusion that the record requires that the findings of the minority report upon the question of taxation and general and direct overhead be found to be reasonable and lawful." (R., 64.)

The Court thus found the minority action to be reasonable and sanctioned it. The majority also used 14 per cent. for Ohio Fuel and United and 12½ per cent. for the Columbus Company. The difference in amounts included for Ohio Fuel was only $125,000.00 and was produced by the application of the percentage to a slightly different base. The allowance to the Columbus Company and the amounts considered for United did not differ. (R., 179, 216; 182, 220; 178, 215.)

In order that the Court may visualize just how much was included for overheads in this valuation we are quoting from the testimony of Welker, valuation witness for the Columbus Company. The incidentals and direct overheads which he says are included in the unit costs made up by the Company are in addition to the undistributed construction costs or general overheads allowed by the Commission and the Court.

"The unit costs for the installation of pipe lines, services, meters, and for equipment generally, include an allowance for incidentals and direct overheads which are an actual part of the cost of the property in place. Items covered by the incidental and direct overhead allowances are as follows:

Incidental Costs:
Field foreman;
Timekeeping and material clerk;
Purchase, loss and use of tools;
Workmen's Compensation Insurance;
Medical Examinations;
Cost of securing labor;
Property Damage.

"Those are the costs that are out-of-pocket costs and are not a part of the costs set up in the labor crew performance.

"In addition to the incidental costs I made an allowance in the unit cost for omissions and contingencies noted on page 6 as a direct overhead cost.

"Further itemizing these costs, as, for instance, as applied to the unit costs for regulators, the direct overheads on material include:

Purchasing	.5 percent
Warehouse handling and checking	1.0 percent
Omissions, loss and waste	3.0 percent
Making a total of	4.5 percent

"As applied to regulators and pipe about regulator stations, on fittings and valves:

Purchasing	.5 percent
Warehouse handling and checking	1.0 percent
Omissions, loss and waste	6.0 percent
Making a total of	7.5 percent"

The witness then goes on to state the other direct overhead inclusions of which the following are totals only:

Installation of mains	15 percent
Incidental costs on mechanical construction equipment	5 percent
Pipe or material incidental to installation of mains	4.5 percent
Fittings and valves (Mains)	7.5 percent

Material and installation costs for service lines (Pipe)	4.5 percent
Material, fittings and valves (Services)	7.5 percent
Meters—material	4.5 percent
Fittings and valves (Meters)	7.5 percent
Structures—including 8 per cent. for superintendence and 10 per cent. for contractors' fee	22 percent

(R., 2270, 2782-2785.)

The Columbus Company was asked to translate these percentages into dollars and cents but it failed to do so. Save for labor the foregoing direct overheads are included in the unit costs allowed and used by the Commission for the local distributing company. This resulted in duplication because in applying the general overhead percentage of course overheads were allowed upon overheads.

In the matter of Ohio Fuel the 14 per cent. for general overheads was applied to valuations that were arrived at by the Commission employing the inventories presented by the Company as well as its claimed unit costs and prices as of December 31, 1929.

The liberality of the Commission and Court is plainly discerned when it is understood that a depreciated direct overhead allowance of $4,205,695.00 was included in the Company's claim for Ohio Fuel on materials, labor and structures, (R., 3166D), and that these claims of the Company were practically all included by the Commission. This is in addition to the 14 per cent. allowed as general overheads in the sum of $7,803,083.00 which

makes a total overhead allowance of almost $12,000,000.00.

No Commission or Court can properly determine the amount to be allowed for undistributed construction expenditures without possessing, first, a knowledge of the plant, and, secondly, a knowledge of the direct overhead charges already packed into the unit costs. Since general overheads are figured by applying a percentage to the value of the physical properties, here again the direct overheads in the unit costs result in producing overheads upon overheads in the final general overheads amount.

In determining the amounts to be allowed for overheads there is no gainsaying the fact that some estimate is necessary. Not all of the factors are susceptible of direct proof. Yet estimates should not be made blindly for there are many polestar indications that may be found in the plant itself. A particular plant is reproduced. We are not dealing with a hypothetical plant. We have before us the plant in question. These properties have a known character. A similar plant is to be reproduced under similar conditions. For example, if quicksand or hardpan have been encountered those contingencies should be recognized and allowed. If those difficulties are not to be faced the estimate should be accordingly decreased.

The element of conjecture is too often magnified by those making a reproduction cost appraisal for a utility. The utility engineers find it to their advantage to reproduce a plant not yet erected instead of reproducing one

directly before them, with fixed and well-known conditions. The reproduction cost appraisal involves no reconstruction. The whole process is imaginary. But the consumer should not be penalized by imaginations running riot for self seeking purposes. All of the items that make up the property are known to the one making the valuation and are susceptible of reasonably accurate determination. The conditions under which installation will take place are likewise fairly definitely mapped and charted.

In an actual reproduction of these companies engineers would not be required to lay out every detail. We are informed that very little engineering was performed on the Columbus property in the process of original construction and Strickler alone for years superintended and managed almost every detail. (R., 656-660.)

The percentage allowed for every component element comprised in general overheads may well be questioned and reasons given for their reduction but we believe that course uncalled for because Courts in prosperous times have often approved an allowance of approximately one-half that made by the Commission in this case.

A 7 per cent. allowance has been affirmed repeatedly in Ohio. We cite three outstanding instances. In **The Hardin-Wyandot Lighting Co. v. Public Utilities Commission of Ohio**, 118 O. S. 592, at page 610, 162 N. E. 262, the Court said a 7 per cent. inclusion was not confiscatory and overruled the contention of the company that a larger percentage should have been allowed. In that case, as here, direct overheads had been loaded into the

unit costs. A like allowance received the Court's approval in **The Portsmouth Gas Co. v. Public Utilities Commission of Ohio**, 119 O. S. 24, at page 31, et seq., 162 N. E. 106. Judge Allen said, in part:

> "The utility also urges that an insufficient allowance was made for overheads and intangibles. On the appraisal it was shown that the following allowance is made:
>
> 'Organization, preliminary engineering, legal expense, interest and taxes during construction, omissions and contingencies, 7 per cent.'
>
> . . . . . .
>
> The allowance for overheads made by the Commission in this instance therefore seems to me not to constitute error."

At a still later date the same Court found that a 7 per cent. allowance was neither unreasonable nor unlawful in the **Logan Gas Co. v. Public Utilities Commission of Ohio**, 121 O. S. 507, 169 N. E. 575.

The Commission and Court in their action on the subject of overhead allowances committed no error prejudicial to the Columbus Company. If there be error, it lies in having approved too much.

VI. Working Capital.

Insufficient allowance in the value of the property of Columbus Company for working capital, materials and supplies is complained of in Assignment of Error 5 (bb). The Company claimed $226,000.00 should be allowed, (R., 2874), the City contended that $80,000.00 was sufficient, (R., 3114), and the Commission allowed $100,000.00 for the item. (R., 183, 221.)

The appellant also complains of insufficient allowance for Ohio Fuel for working capital. It contended for an amount of $3,700,000.00, (R., 2914), and the Commission employed $2,690,132.00, (R., 180), which inclusion was not disturbed by the Court. The Company is mistaken when it states that for this item only $1,700,000.00 was considered. This Assignment of Error is 5 (j).

The amount of the allowance for working capital rests within the sound discretion of the regulatory tribunal. It is a question of fact in each particular case and there is no established rule or formula since the requirements of no two utilities are alike and the circumstances under which they operate invariably differ.

The majority Commissioners, in their opinion on Ohio Fuel, found:

> "Another item in which there is a considerable difference in judgment is the amount necessary for working capital, including material and supplies. The Company asserts that this amount should be $3,700,000.00 while the City claims $1,500,000.00, in spite of the fact that its own witness, Blundon, has adopted the working capital figure of the Company, to wit, $3,700,000.00. The Company bases its estimate (Exhibit 45, page 26), upon what it claims as the amounts shown on the books for material and supplies on hand as of December 31, 1929, and a reasonable allowance for cash in the bank together with an amount sufficient to provide for approximately two months average operating expense and the average cost of gas purchased in one month. We are inclined to the view that neither figure is correct. Analyzing the Company's claim we would eliminate the amount shown by the books for the material and supplies on hand but which are to be used for distribution plants and not for replacements on either

> the production or transmission lines. Manifestly it would be improper to allow them working capital to cover distribution systems in which the City of Columbus has no concern. We feel that the amount of cash necessary should be limited to one and a half months rather than two and that the cost of gas purchased from The United Fuel Company should also be eliminated. Making these deductions we have arrived at the figure of $2,690,132.00 as the proper working capital including material and supplies on hand, 11.1147 per cent. of which is allocated to Columbus." (R., 165, 166.)

We should here explain that the Commission is mistaken in its statement relative to Blundon. He did not adopt the working capital figure of the Company. He merely used the Company figure for convenience in making computations and he did not testify that it should be used. It was and is our contention that the allowance should be based upon facts relative to the Company's business and its actual experience.

Concerning the Columbus Company the Commission said:

> "Working capital will be allowed in the sum of $100,000.00." (R., 171.)

The minority Commissioner, in considering this subject in connection with the Columbus Company, stated:

> "For working capital including materials and supplies, there has been taken a figure of $100,000.00 to take care of payroll expenses, gas purchased and materials and supplies necessary. In fixing this amount I am aware of the fact that a part of the amount is to be used to purchase gas from an affiliated company, which in turn purchased gas from an-

other affiliated company, and that each of these companies has bee nallowed amounts for working capital sufficient for its needs." (R., 209.)

The Commission was right in excluding from the allowance for this item materials and supplies for new construction. These stocks for new construction should not be included in working capital allowance if interest during construction is included in the reproduction valuation as a part of the allowance for general overhead charges and it has been so included here. **Mayhew v. Kings County Lighting Company**, 2 P. S. C. (1st Dist., N. Y.), 659; **Monterey v. Coast Valleys Gas & E. Co.**, 4 Calif., R. C. R., 1366 and 1373.

In addition to a reasonable amount of materials and supplies companies must also have funds with which to pay employees and to meet other current obligations maturing in advance of receipts from customers and this the Commission in its findings has recognized. The prevailing practice before commissions and courts is to include in the valuation a sum sufficient, under normal conditions, to meet or to carry the obligations incurred in bills payable prior to receipt of the returns from bills receivable.

As was stated by Allensworth, (R., 2809), it was not necessary to include anything specifically for gas purchased because

"bills payable for gas purchased are not due until the fifteenth of the month following the month under which the gas was purchased." (According to Com-

pany Ex. No. 11, bills for purchased gas are not due until the twentieth of the following month.)

and

> "The consumer pays bills more or less continuously; the payments are scattered through the month; but the collection for gas distributed the month previous is in the hands of the Company before the bill is due and payable for gas purchased, in other words the consumer in paying his bill finances the Company in its purchase of gas. * * *"

Commissions all over the country have recognized that current collections should reduce the amount of cash allowed for working capital.

Moreover, the Columbus Company's offices are in common with those of Ohio Fuel and the gas purchase contract is an intercorporate arrangement. The Columbus Company and Ohio Fuel units are a part of the "Columbia System."

The $226,000.00 claimed by the Columbus Company for working capital is an arbitrary 5 per cent. (R., 2874.) Welker attempted to support it by saying it was his judgment based upon a number of things, among which was "pipe for extensions". (R., 2799-2801.) He said when extensions were made in 1927 and 1928 it took a great deal of working capital. (R., 2801, 2802, 2804, 2805).

The Company's claim for working capital is greatly overstated and is erected, not upon its experience, but upon the judgment of an employee who is hopelessly confused on the subject to which his judgment is applied. He confuses return on working capital with interest during construction and current management operations

with capital extensions. The total is, therefore, obviously excessive. (R., 2799-2805.)

There is no reason for fixing the working capital merely as a percentage of the appraised value. There is no connection between the two, for working capital must be considered in connection with operating revenues and operating expenses and should be based upon those figures and not upon the total amount of capital invested. Although some commissions have based their allowance for working capital upon a percentage of the capital invested, we submit that the fallacy of such an allowance is so apparent that no Court should approve the principle.

What we have said concerning the limitations to be regarded in determining a proper amount of working capital for the Columbus Company applies with equal force to Ohio Fuel.

The elements considered by Antonelli, of Ford, Bacon and Davis, in fixing $3,700,000.00 as the proper amount, were: Materials and supplies on hand December 31, 1929, one month's cost of all gas purchased, one-sixth of all operating expenses for the year 1929, and also an allowance equivalent to 15 per cent. of all operating expenses for cash in the bank, (R., 1758). Purchased gas is paid for on a date after it has been distributed and the customers and consumers are billed so that their money is used to carry the cost of the commodity.

The materials and supplies used in the estimate did not eliminate capitalizable material to be used in extensions and new developments. (R., 1759-1763.) These

should not have been included as a part of working capital and supplies for maintenance. On cross-examination Antonelli admitted that materials and supplies on hand for new developments were inventoried and added in with maintenance supplies and that no attempt was made to separate them. (R., 1762.)

Under such a theory working capital necessarily assumes large proportions. The more extensions and developments in progress as of the date certain the higher the amount will soar. Companies fail to distinguish between capital account and working capital.

Consumers should not be required to pay a return on working capital and supplies beyond that necessary for a proper conduct of the utility's business in rendering service. Therefore, the facts of actual experience, including the time of the collection of bills from consumers and the intercorporate arrangements for gas purchased, and not the judgment of engineers—unless founded on these elements—should form the basis for the sum fixed by the Commission. There can be confiscation only in respect to the necessary working capital needed by a utility to render service.

The Commission's allowance of $100,000.00 for this item to the Columbus Company and the use of $2,690,132.00 in considering Ohio Fuel's wholesale charge for gas to the Columbus Company were not disturbed by the Court. The facts of the case and the experience of the companies reveal these findings to be generous. At least the Company has no just cause to complain.

VII. Annual Depreciation Charge and Depreciation Reserve.

Appellant, in Assigned Error 5 (cc), protests the allowance to the Columbus Company for annual depreciation.

The annual depreciation allowance claimed by the Columbus Company is $174,880.24. This amount it says it should be permitted to set aside each year. The sum allowed for this item was $68,196.00. (R., 220.)

A natural gas company is required, under the laws of Ohio and the rules of the Commission, to keep and account for a depreciation reserve fund. The General Code of Ohio provides:

> "614-49. Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the commission after investigation shall determine that a depreciation account can be reasonably required. The commission shall ascertain, determine and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation from time to time as it may find necessary.
>
> "614-50. The moneys for depreciation charges thus provided for shall be set aside out of the earnings and carried as a depreciation fund. The moneys in such fund may be expended in new construc-

tion, extensions or additions to the property of the public utility, or invested, and if invested, the income from the investment shall also be carried in the depreciation fund. Such fund and the proceeds thereof, may be used for the purpose of renewing, restoring, replacing or substituting depreciated property in order to keep the plant in a state of efficiency. Such fund and the proceeds or income therefrom shall be used for no purpose other than as provided in this section, except upon the approval of the Commission."

Acting under this authority, the Commission set up a uniform classification of accounts for natural gas utilities requiring the creation of and accounting for a depreciation reserve fund. The statutes very definitely prove that the amount to be set aside is not the property of a utility to dispose of as it may please its fancy.

The Columbus Company has collected and set aside a very large depreciation reserve fund..

The existing depreciation reserve, on December 31, 1929, amounted to $1,166,762.30, (R., 2896), and on December 31, 1930, was $1,251,886.77, (R., 2890), not including an accounting for interest earned. The total value of the physical properties of the Columbus Company, within the city, inclusive of general overheads, as found by both majority and minority Commissioners, as of December 31, 1929, was $3,927,647.00. (R., 182, 220.) The depreciation reserve fund, as of the date certain, was practically 25 per cent. of the value of the total properties, both within and outside the city, and it has continued to increase.

The accrued depreciation employed by the Commis-

sion is approximately 15 per cent. which is indicative of an excellent state of preservation. The existing depreciation reserve fund is, therefore, almost twice as large as the accrued depreciation of properties used. (R., 183, 221.)

Allensworth, for the City, included a larger amount for this item in his operating expenses than was allowed by the Commission but he did not give necessary effect to the existing depreciation reserve.

In view of the past experience of the Company it is certain that the Commission's allowance is more than fair.

The annual credit to reserve, the annual debit against reserve and the reserve at the end of the years 1929 and 1930 are as follows:

As of December 31	Credits During Year	Debits During Year	Reserve at End of Year
1929	$105,000.00	$47,086.92	$1,166,762.30
1930	$97,868.52	19,521.65	1,251,886.77

(R., 2896, 2980.)

The figures of the Company are thus placed before the Court in order that it may be acquainted with the facts that were before the Commission relative to the experience and condition of the Columbus Company when it fixed the annual charge for depreciation.

The high depreciation charge which the Columbus Company claims is contradicted by the small amount of accrued depreciation which they deduct from the reproduction cost new. It must not be forgotten that the accrued depreciation used in this case corresponds to the Company's own claims. (R., 2874, 183, 221.)

The action of the Commission in considering the experience of the Company in arriving at an allowance for an annual charge to depreciation is supported by the authority of this Court. It was held in **Smith et al. v. Illinois Bell Telephone Co.**, 282 U. S., 133, 158, 75 L. Ed., 255, 51 S. Ct., 65:

> "While it has been held by this court that property paid out of moneys received for past services belongs to the company, and that the property represented by the credit balance in the reserve for depreciation cannot be used to support the imposition of a confiscatory rate (Public Utility Comrs. v. New York Teleph. Co., 271 U. S., 23, 70 L. Ed., 808, 46 S. Ct., 363), it is evident that past experience is an indication of the company's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that they are excessive. The experience of the Illinois Company, together with a careful analysis of the results shown, under comparable conditions, by other companies which are part of the Bell System, and thus enjoy the advantage of the continuous and expert supervision of a central technical organization, should afford a sound basis for judgment as to the amount which in fairness both to public and private interest should be allowed as an annual charge for depreciation."

The allowance made to the Columbus Company for annual collection for depreciation is quite ample in view of the facts in this case.

VIII. Taxes.

The Columbus Company has set forth as grounds of error the allowance for excise and Federal income taxes. Assignment of Error 5 (dd). It also complains of insufficient allowance for these items in considering the expenses of Ohio Fuel and for inadequate inclusions for Federal income taxes in United. Assignments of Error 5 (m) and 5 (u) respectively. They maybe commonly disposed of.

The state excise tax rate on November 12, 1929, the effective date of the ordinance in this case, and up to April 6, 1932, which was several weeks after the filing of final briefs before the Commission, was 1.35 per cent. In April, 1932, through an emergency measure passed by the Ohio Legislature for poor relief, it became 2.35 per cent. From this it is apparent that for almost the first half of the 5 year ordinance period the excise tax was 1.35 per cent.

The income tax rate for corporations for the year 1929, and as of the date certain, with deductions allowed amounted to 11 per cent. The rate for the years 1930 and 1931 was 12 per cent. By Section 13 of the Revenue Act of 1932 the rate was made 13.75 per cent..

Counsel for the Columbus Company say that 2.35 per cent. for excise tax and 13.75 per cent. for income tax should have been adopted by the Commission for the ordinance period. In this they are quite wrong for, as we have just shown, the new rates are applicable to only a part of the ordinance period.

The appellant is conspicuously silent on the subject of property taxes. While it is true that excise and income tax rates have increased within the life of the ordinance, it is also true that reductions have occurred in general personal and real property taxes. The allowance as a whole will leave these utilities with a greater income for taxes than that to which they will actually be entitled as an operating expense for the five year ordinance period. The tax rates of the City of Columbus which apply to general personal and real property, covering the entire plant of the appellant located within the City of Columbus, are as follows:

1929.....	2.30 per $100.00 of valuation
1930.....	2.25 per $100.00 of valuation
1931.....	2.17 per $100.00 of valuation
1932.....	2.14 per $100.00 of valuation
1933.....	1.94 per $100.00 of valuation

And in 1934, by reason of the recent amendment to the Constitution of Ohio, the rate for the City will be reduced to 1.44.

The downward trend of property taxes, of which we believe this Court will take judicial notice, is thus exemplified.

Both majority and minority Commissioners made allowances on the basis of 1.35 per cent. for excise taxes and 12 per cent. for income taxes and for property taxes included the amount claimed by the Company which was purportedly based upon actual taxation for the year 1929.

The Commission very properly found that it was necessary to allocate the tax expense of the Columbus Com-

pany between customers located within the City of Columbus and those situated outside the City. About 1/4 of the total property of the appellant is used in service outside the city limits. This allocation was made on the basis of gas sold which places roughly 6/7 of the burden of taxation on Columbus consumers. If the allocation were made on a property basis consumers located outside the City of Columbus would have been compelled to pay approximately 1/4 of the tax cost.

The minority Commissioner found that in the Columbus Company an overstatement had been made due to accruals paid in 1929 that should have been paid previously and he deducted that amount from the Company figure in order to arrive at actual payments for the year. On this subject he said:

> "In the determination of the taxes allowed, I have reduced the property tax, real and personal, representing actual payments instead of accruals, in the amount of $4612.00. Due to changes in expenses, a recomputation of other taxes results in the following credits being given to the company as a result of the earnings shown in the Commission's rate: Excise taxes—$2563.00; P. U. C. O. taxes—$50.00; Federal income taxes—$22,644.00, or total net expenses allowed to the company in the sum of $25,570.00 more than shown by the company in its Exhibit No. 10." (R., 212, 2875.)

The Supreme Court, already quoted on the subject in our discussion of overheads, reversed the Commission on the question of taxes and found that the minority report for this item was reasonable and lawful.

The taxes included for the Columbus Company by the decision of the Court are as follows:

Property tax	$89,565
Ohio excise tax	36,714
Ohio Public Utilities Commission tax	1,394
Federal income tax	22,644
Total	$150,317

(R., 222.)

The experience of the Columbus Company, as shown by its own verified public reports to the Public Utilities Commission of Ohio, in total taxes paid for the **entire** company without allocation to the City of Columbus is as follows:

1929	$139,519.54
*1930	154,117.72
1931	154,687.54
1932	157,187.68
1933	149,588.80

(*R., 2879.)

The allocated tax expense which is chargeable against Columbus consumers for each year will, therefore, be approximately 1/7 less than the above amounts. Reducing these figures by this amount, representing tax paid by consumers outside the City, will not only place the actual tax chargeable to the City far below $150,317.00 per annum but will leave a margin large enough to care for any Federal income tax the Company should have paid but did not pay.

We do not pretend to know where the Company obtained its claimed amounts for taxes set forth in its error

assignments because the amounts allowed by the Commission are very definitely more than enough to care for all proper tax expenses.

The taxes included by the Commission and the Court in considering The Ohio Fuel Gas Company are:

Property tax	$857,794
Ohio excise tax	229,300
Ohio public utilities commission tax	8,706
Federal income tax	573,692
Total	$1,669,492

(R., 219.)

Ohio Fuel is a distributing company as well as a production and transmission company and serves gas directly to 314 cities and villages in Ohio and Indiana. These consumers number about 200,000. It is, therefore, necessary to allocate the entire tax expense of the company as between distribution properties on the one hand and production and transmission properties on the other. In order to show that the Commission and Court did not treat Ohio Fuel unfairly, in determining the proper expense of the Columbus Company for gas purchased, it will suffice to state that Ohio Fuel's own verified public reports to the Public Utilities Commission reveal that its total tax paid for the whole Ohio Fuel Company for the material years has been as follows:

*1929	$889,052.96
*1930	1,271,628.23
1931	1,363,355.88
1932	1,358,290.94
1933	1,343,311.23

(R., 3033.) *Company Ex. No. 90. (1-29.) Original.

Proper allocation to distribution of its share would greatly reduce these figures and yet the tax expense for the entire company in no year equals the total of $1,669,492.00 allowed.

The complaint of the Columbus Company relative to taxes considered for Ohio Fuel is without foundation.

The United Company, as we have said before, furnishes gas to domestic and industrial consumers in West Virginia and Ohio and also sells much gas wholesale to other companies, some affiliated and some otherwise. One of these purchasing companies is Ohio Fuel, a sister company.

The allocation of property and expenses used by the West Virginia and Ohio Commissions is approximately ¼ to domestic and industrial business and ¾ to wholesale business. The Ohio Commission apportioned the wholesale property and expenses to the various purchasers on the basis of sales. The total amount of taxes thus allocated to the wholesale business is $893,788.00 and the portion thereof charged to Ohio Fuel on an M c. f. sales basis is $323,787.00. This was manifestly a very fair division of expense and allowance, insofar as the Company is concerned, because the total taxes paid by the United in West Virginia, Kentucky and Ohio during the ordinance period, as shown by its sworn reports to the Public Utilities Commission of Ohio, are:

1929	$1,189,411.66
1930	961,973.76

1931	938,651.27
1932	1,445,008.17
1933	897,778.96

Dividing the above amounts between domestic-industrial and wholesale demonstrates in no uncertain way that enough taxes were alloted in consideration of the cost of United gas. The total tax allowed being sufficient it follows that at least enough was included for income taxes.

Disregarding the date certain of the case and the fact that depression trend prices and wages have not been used, of which the Company makes no mention in demanding the use of trend excise and income tax rates, we have established that there is no justification for a claim of confiscation in the matter of tax allowance to the Columbus Company, and, moreover, that liberal inclusions were made for taxes for supplying companies in the determination of a proper charge to operating expenses of the Columbus Company for purchased gas.

IX. Merchandising, or as the Company Terms It, "Load Building Expense".

Assigned Error 5 (ee) involves a disallowance by the Commission of certain amounts asked by the Company for annual expense said to be for the purpose of increasing sales of gas. The amount disallowed of which the Columbus Company complains is $29,698.38. Counsel for the Company call this item load building expense but the City asserts that the proper name for it is merchandising.

The Columbia Gas and Electric Corporation has another subsidiary, The Gas and Electric Appliance Company, (R., 2817), whose alleged business it is, separately and apart from the distributing company, to manage the sales of all gas and electrical appliances. (R., 2815.)

The Commission agreed that the item should be eliminated and Commissioner Bricker thus disposed of it:

> "A portion of the business promotion expense representing salaries of $23,677 is disallowed. This expense more properly applies to the sale of appliances and there is no evidence in the case that the expenditure has resulted in an increased efficiency, a greater use or a lower cost for gas." (R., 211.)

The Record shows that the Columbus Company contributed to the expense and maintenance of this Appliance Company, either directly or by contribution, in respect to salaries. The $23,677.00 deducted by the Commission from the $47,438.75 claimed by the Company for this item is described specifically as being salary paid to appliance salesmen who were in the employment of the Appliance Company. (R., 2875, 2816.)

These men were working directly for the Gas and Electric Appliance Company. It is a non-utility company and is engaged in competition with private appliance companies, and its expenses should not be charged to gas consumers. (R., 2824-2827.)

The $6,021.00 which is a part of the $29,698.00 eliminated is an amount the appellant says it spent in participating in exhibitions. This expense, too, was found by the Commission to be chargeable to the Gas and Electric Appliance Company. (R., 211.)

The City has always contended that the Columbus Company had no lawful right to lend its men, money or credit to the Appliance Company especially organized and owned by the Columbia System as another link in the lengthening chain of its enterprises. The Commission and Court action support our position.

The testimony and the exhibits show the Columbus Company's annual contribution to the Appliance Company to be substantially $30,000.00, equal to interest at 6 per cent. on $500,000.00.

The sum claimed was properly disallowed because it is a non-utility charge.

In fixing rates to be charged consumers public service commissions throughout the United States have repeatedly rejected the expense of merchandising and selling appliances. We will cite a few instances of such action.

In **Re New Hampshire Gas & Electric Company**, P. U. R., 1931D, the New Hampshire Public Service Commission used this striking language:

> "This handling of the appliance business illustrates how the profit of an operating utility can be milked through the holding company and subsidiary devices. It is not to be presumed this practice would be followed if the benefits derived accrued to local merchants or an unaffiliated concern. It is merely a scheme whereby the utility does the same business it did before, in the same way, with the same facilities, through the same office and working force, and the profits are diverted to another subsidiary of the 'System' for the benefit of the same ultimate owners.
>
> If it is the will of those directing the affairs of the local utilities that they no longer engage in the ap-

pliance business, their operating expenses should not longer be loaded to carry the business for an affiliated company."

In **Re Accounting for Gas Companies**, P. U. R., 1931D, 436, the Public Utilities Commission of the District of Columbia stated that it had had under study and consideration the matter of revenues and expenses incident to the purchase, sale and installation of gas appliances and used this significant language:

> "The Commission has studied this matter carefully and is of the opinion and finds that the cost of handling, displaying and marketing such appliances should not be borne by the consumers as a whole nor taken into consideration in arriving at any rate to be charged for gas service."

The same rule is applied in **City of Elko v. Elko La Moille Power Company**, (Nevada) P. U. R., 1931C, 14; **Re Cheyenne Light, Fuel & Power Co.**, (Wyoming), P. U. R., 1930E, 114; **Re Broad River Power Co.**, (South Carolina), P. U. R., 1933C, 351; **Re Dixie Power Company**, (Utah), P. U. R., 1922B, 832; **Re Bismarck Gas Company**, (North Dakota), P. U. R., 1920F, 1014; **Re Western Ohio Public Service Company**, (Ohio), P. U. R., 1931D, 1.

The result of the action of Commission and Court as to this item is to exclude from operating expenses of a public utility company the contributions made by such utility to a separate sister appliance corporation. This was altogether proper.

X. Gas Sales.

Assignment of Error 5 (ff.)

The Columbus Company complains because the Commission accepted, and the Court approved, 5,671,639 M. c.f. as the amount of gas sold by the Columbus Company within the City for the calendar year of 1929 instead of what it claimed, 5,848,495 M. c.f.

This was a matter much in dispute. As usual, when forced to close computations, the Columbus Company used the old argument that there were adjustments to be made before its figures could be accepted.

The City's witness, Allensworth, finally did make a complete study—was really forced to do it by the insistent demand of the Columbus Company that he prepare an exhibit in respect to this particular matter. (R., 2852, 2849.) He did prepare it, after many weeks of exhaustive examination, and his City Exhibit 69 was accepted by the Commission as correct. (R., 2834-2841, 3138, 3142.)

It is difficult to understand how opposing counsel expect the Supreme Court of the United States to overturn the unanimous finding of the Commission on this factual matter which was fought out to a finish, and where the Commission accepted as correct the very exhibit which the Columbus Company forced the City to prepare and file. The majority made no specific comment but the minority said:

> "The total M c.f. of gas sold in 1929 is accepted as claimed by the City as more nearly in agreement

with verifications of the Company's book figures. It is 176,856 M c.f. less than claimed by the Company." (R., 212.)

XI. Lost Gas.

In Assignment of Error 5 (gg) the Columbus Company charges that the Commission erred in making an allowance for lost gas.

The Company contended that the line loss is 6½ per cent. of 5,848,495,000 cubic feet while the City presented evidence which showed it to be 5 per cent. of [illegible],639,000 cubic feet.

Here again was a matter that involved sharp disagreement. The Columbus Company tried to prove an almost perfect line condition and yet claim a very high percentage of lost gas.

Seyffert and Allensworth, the one for the Columbus Company, and the other for the City, submitted their studies and estimates to the Commission. Allensworth made a special study of this. (R., 2841.) His study covered the ten-year period just preceding the date certain. The entire Commission agreed with Allensworth and 5 per cent. was accepted as a proper figure for unaccounted for gas. Of this, one of the Commissioners said:

> "There has been allowed as a cost for gas unaccounted for, 5% of the gas actually distributed. This figure is fair because of the relatively high consumption of gas per customer per year." (R., 212.)

The Commission agreed with the City that the line loss should be the average of a decently long period rather than the average of a few years. Marked distortions which at times occur are thus leveled.

XII. Collar Leak Clamps.

Assigned Error 5 (hh.)

The appellant says that the Commission should not have disallowed a claimed expense of installing collar leak clamps on iron and steel screw pipe, which amounted to $37,985.82 for the year 1929.

This, too, is a factual controversy in which the City squarely met the issue and convinced the Commission. (R., 2857, 2858.)

The Commission disallowed the expense item for clamps because it found this to be an item of capital charge, and as such had been theretofore included in the rate base. (R., 171, 172, 211.)

The Columbus Company will not be permitted to use the same expenditure both as a capital charge and as an operating expense.

XIII. Rate of Return.

In Assigned Error 4 appellant charges that the Supreme Court of Ohio erred in sustaining the finding of the Commission in the matter of the rate of return to the Columbus Company and also the rate of return considered proper for the supplying companies.

A public utility is entitled to earn a fair rate of re-

turn on the reasonable value of its property used and useful in the service of the public. **Willcox v. Consolidated Gas Company,** 212 U. S., 19; 53 L. Ed., 382; 29 S. Ct., 192.

In this case the Columbus Company demanded a return of 8 per cent. The City asked that the rate of return be fixed at 6 per cent. The Commission allowed 6½ per cent.

What is the test of a fair return? This Court has answered it as follows:

> "What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." **Bluefield Waterworks Co. v. Public Service Commission of W. Va.,** 262 U. S., 677, 692, 693; 67 L. Ed., 1176; 43 S. Ct., 675.

This rule has been repeatedly reiterated in the later decisions of the Court.

Reference to the rates of return heretofore allowed by commissions and approved by the courts in former cases will not assist in arriving at fair rates of return in these times and under present changed conditions. This Court has often said that no uniform rule is applicable. In a recent case we find this expression:

> "A rule as to the rate of return properly allowable cannot be laid down which will apply uniformly to all sorts of utilities and what may be a fair return for one may be inadequate for another depending upon circumstances, locality and risk." **Smith v. Illinois Bell Telephone Company,** 282 U. S., 133, 160, 161; 75 L. Ed., 255, 269, 270; 51 S. Ct., 65.

For the purpose of establishing the rate of return, the utilities offered the testimony of Wheeler relative to a bond issue on 40 Wall Street, New York City. Wheeler stated that these bonds were offered to the public at 96½ and that they carried 6 per cent. interest. (R., 960, 961.) Witnesses from Columbus building and loan companies were also called by the Columbus Company who stated that the rate of interest on first-mortgage real estate as of December 31, 1929, was from 6 to 7 per cent. Upon cross-examination these witnesses admitted that the bulk of their deposits drew 5 per cent. interest, (R., 962, 981), which is, of course, subject to Federal income tax. So these depositors receive 5 per cent., less income tax. The utilities would naturally select the best examples possible for their purpose at that time, but everyone knows that real estate has had a difficult road to travel since

December 31, 1929. The risk involved in real estate investments has been much greater than that experienced in any utility business—and especially the gas business. The building and loan companies have been compelled to exercise their statutory right to prevent withdrawals of deposits and practically no capital is being attracted to that field. Matters have gone from bad to worse for real estate during the last four years.

One cannot easily compare the gas business with that of similar private business undertakings in these times because this business in Columbus is not one of much risk or hazard. The statutes and the Federal constitution permit and insure proper returns. Allensworth, testifying for the City, said that he was familiar with business hazards in the City of Columbus and that he knew of no private business operating in this City with as little risk as the gas company. He offered evidence of the sufficiency of a 6 per cent. return. (R., 981-989.)

In the past natural gas companies have demanded a high return on a pretense of a diminishing supply and early exhaustion of their commodity. But in this case Dewing, for example, witness for the Company, said:

> "I think experience has shown since then not only in the eastern fields but in the western fields, but more and more the great trunk lines are being tied up with each other, so that instead of drawing from particular fields we are drawing really from a great reservoir of natural gas, so that the possibility of one particular locality being destitute of natural gas —that possibility seems to be, with the development of the industry, growing less and less each year.

Q. And that, generally speaking, in a city like this, is a factor that need not be noticed? A. That is what I was assuming, yes, sir." (R., 2598, 2599.)

Wheeler also admitted that 5 years ago consumers were being educated to use less gas in order to conserve it and that now they are being induced to use more gas because the reserves of gas are much larger than was believed to be the case years ago. (R., 2664.)

There is no present or practical danger of the exhaustion of the supply of natural gas. That alleged risk, which was the club that beat many municipalities into submission, has entirely disappeared. The Company's own testimony has removed the fear of a shortage of gas as a reasonable or proper factor to be considered in the case.

The Commission found from the evidence that for all practical purposes the supply of natural gas available for this market is unlimited. (R., 192.)

No one can deny that private businesses in Columbus comparable to the gas business—except that they are attended by greater risks—would at this time consider 6½ per cent. return as not only ample but also a generous earning.

The trend of money rates downward and the general low return to private businesses since December 31, 1929, are well known to the Court. What we said to the Commission in 1932 and the Supreme Court of Ohio in 1933 we now repeat. Present conditions are not to be disregarded. The dire business depression which now exists, and of which the Court will take judicial notice,

must affect the rate of return to be received by utility companies. We know that commodity prices in general have descended, that a vast number of men and women are out of employment and that wages have been decreased. This unprecedented slump has forced the rate of return to private business to lower and lower levels. It is now incumbent upon regulatory bodies and courts to bear in mind these facts and to give merited effect to them in reaching results. But why waste words trying to describe that which defies description? This Court, both collectively and individually, know the depth of the present financial depression.

The language of this Court in **Los Angeles Gas and Electric Corporation v. Railroad Commission of California, supra,** applies with full force to the instant case:

> "But we know that the estimates of present value, taken as the cost of reproduction as of December 31, 1929, based upon average prices from 1926 or 1927 to 1929, furnished no dependable criterion of values in the succeeding years. The country was facing a most serious decline in prices. It was entering upon a period of such depression as to constitute 'a new experience to the present generation'. It was not the usual case of possible fluctuating conditions but of a changed economic level."

This ordinance period has now less than 1 year to run and it is clear that the whole of it is practically within the limits of this depression.

The majority Commission, after citing the principles established in **Bluefield Waterworks and Improvement**

Company v. Public Service Commission of West Virginia, supra, made the following comment:

> "This puts up to the Commission a test which, under the present depression, is different from any that has heretofore confronted us. In prosperous times 7 and 8 per cent. and even more were allowed. A gas company is a more hazardous undertaking than is a water company or power company because its whole existence depends upon the continuance of the gas supply and therefore it might be justly said that such a company would be entitled to a greater rate because of the greater risk involved.
>
> However, gas seems now to be such an assured product that for the purpose of the present consideration it may be regarded almost as reliable as a water supply. The test of 'equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings' presents a new question on account of the present depression. Many other business undertakings at this time in this community are making nothing, but it would be manifestly unlawful for us to say that, due to this fact, this business should be required to serve without a fair return. Giving the matter our serious consideration we have determined that a present rate of income of 6½ per cent. should be allowed to each of the three companies involved and that their legitimate expenses should be computed on that basis." (R., 169, 170.)

A review of the cases decided by this Court shows that prior to 1914, a net return to public utility companies, including gas companies, of approximately 6 per cent. was considered sufficient. **Knoxville v. Knoxville Water Co.**, 212 U. S., 1; 53 L. Ed., 371; 29 S. Ct., 148; **Willcox v. Consolidated Gas Co.**, 212 U. S., 19; 53 L. Ed., 382; 29 S. Ct., 192; **Cedar Rapids Gaslight Co. v. Cedar Rapids**, 223 U.

S., 655; 56 L. Ed., 594; 32 S. Ct., 389; **Des Moines Gas Co. v. Des Moines**, 238 U. S., 153; 59 L. Ed., 1244; 35 S. Ct., 811.

The fact that each of these companies is a part of the Columbia system should be given due consideration by the court in establishing a fair return. It was held in **Chesapeake & Potomac Telephone Company v. Whitman**, 3 Fed. (2nd), 938, 953, that ownership by a holding company which increases the ease of securing new capital reduces the rate of return. That this situation of companies demands recognition has also been indicated by this Court:

> "It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of constituent companies and securing their efficient and economical management." **Smith v. Illinois Bell Telephone Company, supra.**

It is important to observe that the Federal income tax was included in the operating expenses allowed the Columbus Company and also in those expenses considered for Ohio Fuel and United. We maintain that the inclusion of this tax as a part of operating expenses should reduce by the full amount of the tax the return which would otherwise be allowed.

The City included Federal income tax as a part of the operating expenses in its evidence before the Commission but submitted that, when it is so included, it justifies reducing what would otherwise be a fair return by the amount of the resulting exemption to stockholders. (R.,

985.) The minority Commissioner, in his opinion, mentioned the fact that the Commission included income tax as an operating expense, and agreed with the majority that a 6½ per cent. was ample. (R., 206.)

It is proper to include Federal income taxes in the operating expenses of a public utility in a rate case. **Galveston Electric Co. v. Galveston, supra; Georgia Railway Co. v. Railroad Commission,** 262 U. S., 625; 67 L. Ed., 1144; 43 S. Ct., 680. But it will readily be seen that the inclusion of Federal income tax in operating expenses shifts the tax from the company to the consumers.

The Revenue Act of 1928 permits the exemption from Federal income tax of all dividends received from domestic corporations paying the Federal income tax. Thus the Federal income tax on corporations permits a deduction of dividends received from domestic corporations.

The Supreme Court of the United States has applied the principle for which we contend in the following cases: **Galveston Electric Co. v. Galveston,** 258 U. S., 388, 399; supra; **Georgia Ry. Co. v. Railroad Commission,** 262 U. S., 625, 633, supra.

In the former case the court said:

> "In calculating whether the 5 cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others. But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under Section 216 a stockholder does not

include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is, therefore, in effect, part of the return on the investment."

In the latter case Mr. Justice Brandeis said:

"The probable return based on the value and the probable income found by the Commission would be nearly 7¼ per cent. It must be borne in mind, as pointed out in Galveston Electric Co. v. Galveston, supra, that since dividends from the corporation are not included in the income on which the normal federal tax is payable by stockholders, the tax exemption is, in effect, an additional return on the investment. A return of 7¼ per cent.—in addition to this tax exemption—cannot be deemed confiscatory."

Assuming that the return otherwise here allowable may be reduced by the amount of the resulting exemption of stockholders, the measure of exemption should be the full amount of the tax because the stockholder of the Columbus Company and of Ohio Fuel and of United is a corporation, The Columbia Gas and Electric Corporation. Now a corporation is exempt from paying a 12 per cent. tax on all dividends received from domestic corporations. Therefore, the measure of the exemption to the stockholder of these companies is 12 per cent. of the dividends received from these companies which means that the resulting exemption is equivalent to the amount of the original tax.

We submit that the inclusion of Federal income tax in the operating expenses of the Columbus Company and of Ohio Fuel and of United provides these companies with

a return in addition to that percentage which the Commission allowed.

An impartial scrutiny of all the circumstances surrounding these companies, their consumers and customers, revenues and depreciation reserves, the trend of the money market, the decline in commodity prices, conditions as of December 31, 1929, and down to the present time, the depression and the results produced thereby, returns to private businesses similarly situated, the localities involved, the risks, or the freedom therefrom, and the inclusion of Federal income tax as a part of operating expenses, must inevitably lead the Court to the conclusion that a fair return on the reasonable value of these various properties should not exceed 6½ per cent.

Now, when the whole business world seems to be in chaos, when almost all businesses are in the red, when even the majority of the most secure and less exposed business undertakings are glad to break even, who shall say that this utility shall not be content with 6½ per cent. on the value of its properties as of December 31, 1929?

Counsel for the Company cannot be serious, surely, when they state, in Company Brief at pages 25 and 224, that the Commission reduced both the rate base and the rate of return on the assumption that a depression was to follow. Both minority and majority Commissioners used unit prices and values as of December 31, 1929. Counsel for the City are astounded at the assertion to the contrary. At the top of Exhibits "A", "B", and "C" of the majority opinion, (R., 178, 179 and 182), appear the

statements that these valuations are as of "12-31-29" which, of course, means December 31, 1929. At the top of the corresponding exhibits of the minority opinion appear exactly the same statements. (R., 215, 216, 220.)

The Commission recognized the effects of the depression in fixing a rate of return but that is the one place. Otherwise the values and prices were as of the pre-depression era.

The Court disturbed no unit costs or prices employed by the Commission.

It follows without question that the action of the Commission and lower Court in granting a 6½ per cent. return, under existing conditions, is entirely fair and reasonable.

XIV. Exorbitant Operating Expenses.

The Columbus Company is hopelessly over-capitalized. It has outstanding securities as follows:

Preferred 60,000 shares, par value...	$6,000,000.00
Common 30,000 shares, par value....	3,000,000.00
Bonds	1,331,000.00
Total.....	$10,331,000.00

(R., 689, 690.)

All of these securities are in the hands of The Columbia Gas and Electric Corporation.

The Commission unanimously found the fair value of the property of the Columbus Company devoted to serv-

ice of the public within the City, as of December 31, 1929, to be as follows:

Distribution system	$3,252,344.00
General property	238,898.00
General overheads	436,405.00
Total physical property	$3,927,647.00
Working capital and materials and supplies	100,000.00
Total properties used and useful	$4,027,647.00

(R., 182, 220.)

It will be recalled that the above valuations were arrived at by the use of reproduction cost new less depreciation.

The value of the Company's properties outside the City are said to be about one-fourth of the value of those located within the City and it may well be inferred from this that the securities of the Columbus Company contain some watered stock.

The Columbia System purchased the Columbus Company in 1924. (R., 896.) On the fourth day of August, 1924, council of the City passed an ordinance effective for a 5 year period from the twelfth day of September, 1924. On April 29, 1925, the Columbus Company filed a bill of complaint in the Federal District Court praying for injunctive relief against the City on the ground that the rate ordinance was unconstitutional and confiscatory. The Court found that the ordinance rate of 40 cents per M c. f. was not confiscatory and established an interim rate of 48 cents per M c. f. as a fair rate. The

Court, on February 12, 1927, found that the operating expenses for the ordinance period should be as follows:

Distribution expense.....	$85,348.71	
Attending gas purchased	3,679.29	
Commercial expense.....	79,994.80	
General expense.....	60,105.37	
2%added account increased consumption.....	4,582.56	
Taxes:		
Property	95,372.73	
Excise	27,780.90	
Public Utilities Com.....	1,538.47	
Capital stock.....	3,646.53	
Federal income.....	34,068.67	
Total of above expenses.....		$396,118.03
Depreciation allowance.....		60,014.94
Available for return.....		305,030.70
Total operating expenses, exclusive of purchased gas.....		$761,163.67
Gas purchased 5,976,583 M at 26 cents per M c.f.....		$1,553,911.58
Total operating expenses.....		$2,315,075.25

This decision is applicable to the ordinance period from September 12, 1924, to September 11, 1929. **The Columbus Gas and Fuel Company v. City of Columbus**, 17 Fed. (2d), 630, supra.

But in the present case the Company contended that the following operating expenses should be allowed as of December 31, 1929:

Purchased Gas Expense.	$ 1,078.32	
Distribution Expense...	141,534.62	
Utilization Expense....	28,865.93	
Commercial Expense....	108,798.99	
Business Promotion Expense	47,438.75	
General Administrative Expense	86,577.73	
Other General Expense.	125,359.98	
		$539,654.32
Taxes:		
Property	94,176.95	
Excise	34,150.96	
Public Utility Com.....	1,343.63	
		$129,671.54
Depreciation		177,617.36
Return at 8%.....		429,167.92
Total (Exclusive of purchased gas)		$1,276,111.14
Gas purchased 5,848,495 M at 45 cents per M c. f.....		2,814,783.75
Total operating expenses.....		$4,090,894.89

(R., 2875.)

The Commission made, and the Court did not disturb, the following allowances, exclusive of gas purchased,

except as to taxes, and that item was lowered only $5,642.00:

Purchased gas expense....	$ 1,078.00	
Distribution expenses.....	120,611.00	
Utilization expenses.....	28,866.00	
Commercial expenses.....	108,799.00	
Business promotion expenses	23,762.00	
General administrative expenses	56,263.00	
Other general expenses....	68,524.00	
Taxes	150,317.00	
Minimum charges (Red)..	(43,980.00)	
Discounts and penalties (Red)	(34,469.00)	
Depreciation	51,154.00	
Return at 6½%.....	261,797.00	
Total exclusive of gas purchased..		$792,722.00.

(R., 182, 220.)

Correcting the majority error concerning the age and life of existing gas wells, which is fully discussed under Amortization, reduces the fair charge to the Columbus Company before allocation by about 4 cents per M c. f. Applying the principles of demand-mileage allocation to transmission properties, as approved by the Supreme Court of Ohio, which we present under Allocation, and using the majority Commission findings in all other respects, will reduce the gate charge at Columbus by 5.17 cents per M c. f. The total of these necessary reductions is, therefore, 9.17 cents.

The majority Commission found that the gate charge to Columbus by Ohio Fuel should not exceed 39.02 cents. (R., 179.) Deducting 9.17 from this figure on account of the above difference resulting from the judgment of the Court on two erroneous findings only would give the City a wholesale charge for gas of 29.85 cents per M c. f. at the city gate.

Using the Commission's figure of 5,955,221 M c. f., (R., 179), as the quantity of gas necessary to purchase, based upon 1929 business, and employing 29.85 cents per M. c. f. as the fair cost thereof to the Columbus Company, we arrive at a total yearly cost for purchased gas of $1,777,633.46.

Adding then the allowed operating expense of both Commission and Court, exclusive of purchased gas, as above set forth, and the cost of purchased gas figured on the foregoing basis, the total operating expense to the Columbus Company is found to be:

	$ 792,722.00
	1,777,633.46
Total operating expense.....	$2,570,355.46

(Dividing this amount by 5,671,639 M c. f., which the Commission adopted as gas sold, (R., 182), produces a total distribution rate to Columbus consumers of 43.5 cents.)

It follows naturally that if these corrections are applied to the minority findings, (R., 217, 220), the result will be a still lower figure for operating expenses and support a lower charge to consumers than that above shown.

The result of the finding of the Commission and decision of the Court thus determines an annual operating expense for the Columbus Company as of December 31, 1929, that in no event can exceed the above amount.

Between April 1, 1914, and December 31, 1924, the Company declared dividends in the amount of $4,676,498.81, (R., 2896), and at the same time interest was regularly paid on the outstanding mortgage bonds. (R., 690, 691.) At the time the Columbia System took over the Columbus Company in 1924 it distributed a surplus of $268,106.25, and on December 31, 1929, reported a surplus of $128,443.92. (R., 2896.) It also possessed a reserve fund of $1,166,762.30 on December 31, 1929. (R., 2896.) It has always paid the interest on the outstanding mortgage bonds which must be classified as a return.

Notwithstanding the finding of the Federal Court in 1927 and the recent determination by the Commission and the Supreme Court of Ohio that adequate funds are available, the Columbus Company claims to have paid no dividends since 1924. We may remark that it may have paid no dividends as such.

Columbus is not essentially an industrial town and for that reason does not soar as high as some other cities in prosperous eras, but neither does it descend entirely to the bottom in less prosperous times. Owing to this fact the Columbus Company has enjoyed rather uniform revenues. The Record is thoroughly convincing that sufficient revenues were available for the returns indicated by the Federal Court and the Commission. What then, it may be asked, has happened to the moneys that should

have been available for dividends? That is not difficult to explain as was discovered by the Commission. Commissioner Bricker said:

> "In the consideration of these expenses it is noted that there has been an increase since 1924 in the total general administrative expenses from $33,623.00 to $101,298.00 in 1929; an increase in other general expenses from $76,231.00 in 1924 to $107,570.00 in 1929 and a total increase in expenses, excepting gas purchased, from $294,069.00 in 1924 to $584,144.00 in 1929. During this time the property was taken over and managed by The Columbia Engineering and Management Corporation and expenses incurred with the intent and purpose, according to the witnesses of the company, of increasing the consumption of gas and decreasing the cost of distribution. The result at least is not consistent with the purpose advocated." (R., 212.)

It is not merely coincidental but ominous that operating expenses have increased inordinately almost from the very inception of Columbia System ownership and management in Columbus.

The general administrative expenses were boosted by a payment of 2½ per cent. of the gross revenues of the Company to The Columbia Engineering and Management Corporation; new expense items sprang up and grew; into the general expense account almost everything was loaded as is shown by pages 6, 7 and 8 of Company Exhibit No. 10, (R., 2875), and the cost of gas from Ohio Fuel at the city gate was advanced to 45 cents per M c. f.

The Columbus Company claims the following operating expenses for the years 1925 to 1930, inclusive—before depreciation allowance, taxes and return:

	Operating Expenses
1925	$2,302,819.69
1926	1,948,149.69
1927	2,391,639.02
1928	2,739,054.82
1929	3,158,502.88
1930 (Without depreciation and taxes)	3,625,542.00
(Including depreciation and taxes)	3,878,098.06

(R., 3054-3056A, 2979.)

It is thus shown that the operating expenses of the Company, for comparable figures, were increased $1,322,722.31 from 1925 to the end of 1930 and that the 1930 expenses were increased $1,677,392.31 over those of 1926. In this advancement the cost of gas did not play an unimportant part.

With operating expenses growing up like Jack's bean stalk, through intercorporate arrangements, of course the Columbia System pretends to have received no dividends but that is only because it has other means of taking its profits from the Company than by the fairer method which is known as declaration of dividends.

It is a principle too clearly established and recognized to require argument that a ultility is entitled to only a reasonable allowance for operating expenses and manifestly excessive claims for operating expenses must be reduced or wholly disallowed.

Counsel for the Company virtually contend that the Commission and Courts are powerless to cope with this situation but must accept it. No such imperial doctrine exists, even under the guise of managerial capacity. This Court spoke impellingly and decisively on this question in **Chicago and Grand Trunk Railway v. Wellman**, 143 U. S., 339, 346, 36 L. Ed., 170, 179, 12 S. Ct., 400:

> "While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some improper way, transfer its earnings into what it is pleased to call 'operating expenses'."

And later in **United Fuel Gas Co. v. Railroad Commission**, 278 U. S., 300, 320, it was said:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders."

Suffice it to say that it does not matter whether the Columbia System, as owner of the Columbus Company, receives its return directly from that company or through its own subsidiaries into which the revenues of the local company are freely poured.

It may here be pertinent to relate that the offices of the Columbus Company, The Ohio Fuel Gas Company, The Appliance Company, The Columbia Engineering and Management Corporation for Ohio, and other interrelated companies are all in common at 99 North Front Street in the City of Columbus.

The Columbia Engineering and Management Corporation.

There are other very interesting facts in the Record which have a direct bearing upon the operating expenses of the subsidiaries to The Columbia Gas and Electric Corporation.

In respect not only to the Columbus Company but also to both Ohio Fuel and United there were included in their respective operating charges large fees paid by the respective utilities to the Columbia Engineering and Management Corporation, which was organized by, and which is owned and controlled by the Columbia System for the purported purpose of furnishing expert engineering and management advice and service in all of the corporate relations and activities of its subsidiaries. In truth, in this Engineering and Management Corporation is centered the dominant and absolute will and control of each subsidiary.

The Columbia Engineering and Management Corporation was organized December 1, 1925 under the laws of Ohio by persons connected with the Columbia System. Its original directors are dominant leaders in the Columbia System. Its stock has always been owned by the Columbia Gas and Electric Corporation, except possibly the few qualifying directors' shares, and apparently even those are also held by that same company. (R., 709.)

An annual fee of from 2 per cent. to 2½ per cent. of the gross revenues of each subsidiary is collected each year

by the Columbia System and paid into the treasury of The Columbia Engineering and Management Corporation. And in addition to the fee the Management Company bills each company owned and controlled by the Columbia System for engineering services and costs. In 1929 it collected from the Columbus Company $82,642.25 as a fee and $11,170.29 for engineering services and costs, making a total of $93,812.54. And in the same year Ohio Fuel paid into its coffers $417,390.24 as a fee and $147,-943.70 for engineering services and costs or an entire sum of $565,333.94. For the same period United Fuel was called upon to pay $279,331.27 as a fee and $69,866.05 for engineering services and costs, or a total amount of $349,197.32, (City Ex. No. 43, Original), making the total paid by all three companies $1,008,343.80. In 1930 it collected from the Columbus Company $84,567.37 as a fee and $59,358.67 for engineering services and costs, making a total of $144,926.04. And in the same year Ohio Fuel was called upon to pay $543,957.69 as a fee and $67,807.71 for engineering services and costs, or an entire sum of $611,765.40. For the same period United paid $271,-196.18 as a fee and $48,456.38 for engineering services and costs, or a total of $319,652.56, (City Ex. No. 43, p. 2, Original), making the total paid by all three companies $1,076,344.00.

It is interesting to note that under these practices the Engineering and Management Corporation's fees are often doubled and sometimes tripled. For example, the gross sales by United to Ohio Fuel for Ohio consumers

are taxed at 2½ per cent. under the United's Engineering and Management Corporation contract although Ohio Fuel, when it sells some of the same gas to the Columbus Company for use in the City of Columbus, is required to pay 2 per cent. on the gross sales under another Engineering and Management contract, and although when the Columbus Company sells the same gas to its consumers in Columbus another Engineering and Management fee of 2½ per cent. on the gross sales is exacted. (R., 701.)

The story of the meteoric rise and almost unbelievable dividends of The Columbia Engineering and Management Corporation is a strange tale; actualities are truly sometimes stranger than fiction.

The original issue and sale of stock was 1,000 shares, at $100.00 per share, $100,000.00, which represented the only original and basic capital that ever went into this Management Corporation. Thereafter the outstanding stock was increased not by the sale of new shares but by the issuance of stock dividends out of accumulated surplus earnings. (R., 709.) In 1926 the authorized capital was increased from 1,000 shares, all of which had been issued, to 100,000 shares and there were distributed to its stockholders as a stock dividend 99,000 shares of stock, that is, 99 shares of new stock for each share of the old stock then outstanding. For this new stock there was transferred from the surplus account to the capital stock account the sum of $250,000.00. (R., 709, 710.) Then in 1928 the authorized capital was increased from 100,000 shares, the whole of which had then been issued, to

500,000 shares and there were issued in stock dividends 400,000 shares of stock at the rate of 4 new shares for each old share then outstanding. For this new stock there was transferred from surplus to the capital stock account the sum of $650,000.00. (R., 710.) To put it differently, there was first a 99 for 1 stock dividend and then a 4 for 1. Still stated differently, there is now outstanding $1,000,000.00 worth of stock, although only $100,000.00 of money or property was ever put into the corporation. But this is not the whole story. There have been large cash dividends paid, $2,250,000.00 in 1928, $2,000,000.00 in 1929, and $1,500,000.00 in 1930, a total of $5,750,000.00. (R., 710.) Moreover, at the end of 1930 there was a surplus of almost $500,000.00.

Since the Company was organized at almost the close of the year 1925 we are speaking of 5 operating years, 1926, 1927, 1928, 1929 and 1930, in which 5 years the stockholders received a profit of $900,000.00 in stock dividends and cash dividends of $5,750,000.00, and still possess a surplus of almost $500,000.00. In other words, those 5 years show the astounding profits of $900,000.00, $5,750,000.00 and $500,000.00, a total of almost $7,150,000.00, all of which has been hatched out of the original nest-egg of $100,000.00—unjustly squeezed out of the System's many subsidiaries. (R., 702-712.)

Of course there was a contract between the Columbus Company and the other subsidiaries and The Columbia Engineering and Management Corporation. The contract with the Columbus Company is City's Exhibit No. 19, Original.

The Engineering and Management Corporation agreed, subject to the discretion of the utility, to furnish or suggest proper persons for the executive officers, chairman of the board, president, vice presidents, secretaries, treasurers, etc.

The irony of it is that the Columbus Company is completely and unreservedly under the domination of The Columbia Gas and Electric Corporation and its dominant subsidiary, The Columbia Engineering and Management Corporation. Its very brain is in the Engineering and Management Corporation which has taken over, for its very own, practically every outsanding executive, engineer and specialist formerly attached to the subsidiaries, to 48 of whom is paid a total annual salary of $830,035.54. (R., 707, 708.) Fourteen of these men received $499,158.30, (Company Ex. No. 79), or about $35,600.00 each annually. (R., 708, 709.) These modern engineering and management corporations use the word management advisedly. They do actually control and manage the subsidiaries. For example, neither the Columbus Company nor Ohio Fuel nor United has any real right to think or act independently. Each does exactly what is imposed upon it from above. It does nothing that is not acceptable to those above. It does nothing except what those above desire it to do. The inter-corporate control and inter-locking directorates are complete. It is not necessary for us to attack the legality of such a condition, although the mere statement of it raises many questions. Surely there should be no pretense that there is any real or arm's length contract for services and management

between any one of these subsidiaries and the Engineering and Management Corporation.

There is a considerable amount of false argument connected with the attempt to magnify the accomplishments of the Engineering and Management Corporation as compared with what the companies were doing prior to its formation.

Witnesses have claimed, and counsel in their brief before the Commission argued, that great contributions have been made to the Columbus Company by the Engineering and Management Corporation. For example, they point to the development of the system, to the rectification of troubles and to the attachment of business.

The Record shows the fallacy of their claims in respect to the development of business. We have shown that for years the Columbus Company refused to extend, to develop its own business, that it even secured an injunction restraining the City from enforcing the Company's obligations in that respect, and further, that finally the Federal Court, upon motion of the City, by mandatory injunction compelled the Company to make its extensions. The Record shows that the new customers so added amount to possibly 2,000 or more.

Further, concerning the engineering side of the developments here in Columbus for the last few years, we need only to recall that the Columbus Company's old superintendent, Strickler, very clearly, and rather boldly, said that he had been able to get along with little help from engineers, apparently finding no difficulty in car-

rying on without an engineering and management corporation and its attendant expenses. (R., 655-661.)

These figures tell their own story and in themselves show that the Ohio Commission should have cut out, root and branch, all arbitrary Engineering and Management Corporation fees and charges.

The City insists that no part of the Management fee should be charged against the City in this rate case and that the Commission was more than fair to the Columbus Company when it eliminated only a part thereof.

Many recent cases may be cited to show that it has become a well settled principle throughout the country to disallow system management fees and to permit proper charges to be assessed at proven cost only. We shall not here pursue the matter at greater length, for these facts are being presented not so much to show the generosity of the Commission,—although it was liberal—but rather for the purpose of directing attention to the reprehensible methods by which the Columbia System claims its profits and yet avoids declarations of dividends by subsidiary companies.

II.

THE FAIR CHARGE OF THE COST OF PURCHASED GAS TO OPERATING EXPENSES OF THE COLUMBUS GAS AND FUEL COMPANY.

In the preceding pages we have discussed those assigned errors relating to the appellant and such subjects concerning Ohio Fuel and United as could properly be treated at the same time. This procedure, we believe, has minimized duplication.

The City, in meeting appellant's claims relating to the properties of Ohio Fuel and United, does not wish to be understood as acquiescing in any assumption that appellant can here assert the constitutional rights of these companies.

We maintain that it is incumbent upon one who seeks an adjudication that a state statute—which includes a city orinance or an order of a public utilities commission—is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional. **Louisville & Nashville R. R. Co. v. Finn**, 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146; **Mallincrodt Chemical Works v. Missouri**, 238 U. S. 41, 59 L. Ed. 1192, 35 S. Ct. 671; **Missouri Ry. Co. v. Cade**, 233 U. S. 642, 58 L. Ed., 1135, 34 S. Ct. 678; **Ballard v. Hunter**, 204 U. S. 241, 51 L. Ed. 461, 27 S. Ct. 261; **Plymouth Coal Co. v. Commonwealth of Pennsylvania**, 232 U. S. 532, 544; **Erie R. R. Co. v. Williams**, 233 U. S. 685, 58 L. Ed. 1155, 34 S. Ct.

761. In the case of **Newark Gas Co. v. Newark**, 264 U. S. 405, 61 L. Ed. 393, 37 S. Ct., 156, where the appellant was a gas distributing company, whose rates were fixed by an ordinance, purchased its gas from a supplying company which was not a party to the case, it was held that the effect of the ordinance upon the constitutional rights of the vendor was immaterial to the appellant's cause. It was said in the opinion delivered by Mr. Justice Pitney that the pertinent question was what the appellant would probably have to pay for gas during the life of the ordinance.

To the same effect is **Public Utilities Commission for State of Kansas v. Landon**, 249 U. S. 236, 63 L. Ed. 577. In this case it is held in an opinion by Mr. Justice McReynolds that:

> "The challenged orders related directly to prices for gas at burner-tips and only indirectly to the receivers' business. They were under no compulsion to accept unremunerative prices; * * *."

The receivers referred to in the opinion were operating vendor supplying companies.

The appellant can here avail itself only of those constitutional questions affecting its own rights. It cannot claim confiscation of the properties of Ohio Fuel or United regardless of affiliations.

The major operating expense claimed by the Columbus Company is the cost of gas purchased from Ohio Fuel, an affiliated corporation, at a contract price of 45 cents per M c. f. at the city gate. We have already related that in arriving at a fair operating expense to be allowed

the Columbus Company the Commission exercised its authority to determine the fairness of the price between these commonly owned companies, and finding the contract price unreasonable, ordered what it considered a proper charge to the operating expenses of the appellant. **Western Distributing Company v. Kansas Public Service Commission**, 285 U. S. 119, supra. **Smith v. Illinois Bell Telephone Company**, 282 U. S. 133, supra.

The valuation of Ohio Fuel properties other than land and leaseholds, as included by both minority and majority Commissioners, and not disturbed by the Court, was arrived at by reproduction, employing the inventory quantities presented by Company to which was applied the Company's claimed unit costs and prices as of December 31, 1929. The principal items embraced in the reproduction were, of course, pipe lines, compressor stations, gas well equipment and construction and structures.

In the application of legal principles employed by the Commission in arriving at a fair cost of gas to the Columbus Company, the Supreme Court of Ohio, on error proceedings, held certain findings to be unreasonable and hence unlawful. We shall discuss each of these matters at length under their appropriate headings but wish to point out in the beginning that the reversal of the Commission on allocation and correction of a clear mistake on the part of the majority Commission relative to the age and life of existing gas wells under Amortization are alone more than sufficient to sustain the ordinance rate figured on all other valuations and allowances used by the majority Commission.

1. Unoperated Leaseholds—The Ohio Fuel Gas Company.

The Columbus Company, under Assigned Error 5 (a), protests the disallowance of any return upon gas leaseholds of Ohio Fuel, classed as Numbers 2, 3 and 4.

The Company urges that these leaseholds are owned and used by Ohio Fuel as the source of supply of natural gas. This contention, as we shall see, is refuted by the Company's own evidence which shows that there are no producing wells on No. 2, No. 3 or No. 4 classifications and that they are all unoperated.

Ohio Fuel possesses some rights in certain acreage which are referred to as leaseholds. It owns no part of it in fee and no tax is paid upon it to either county or state but it is held only by leases that give the company the right to enter upon the land and prospect for and remove oil and gas in accordance with specific terms set forth. These leases are made for a term of years and must be renewed at the expiration thereof, unless wells are drilled, in which event they continue as long as gas and/or oil is produced. There are more than 100 different forms of leases but all of them are basically very much the same. The owner of the land is paid a small cash consideration at the time of the execution of the lease and is also paid a rental while his land remains unoperated, but in case of production a fixed percentage is paid as royalty on oil wells and a definite cash sum is paid annually for each gas well. The usual amount paid

for a gas well is $200.00. (R., 1080, 1081.) The sums thus paid for operated acreage are an operating expense and were allowed by the Commission and Court. (R., 181.)

The Columbus Company presented certain claims for alleged valuations of the leaseholds of Ohio Fuel, (R., 2910, 2911), which were put in evidence through Seyffert.

It produced for cross-examination Dally, Wittmer, Meals and Webber, who made up the said valuation figures. They did not give any direct testimony on the subject. We shall have occasion to discuss their statements rather fully under Operated Leaseholds.

To these leaseholds Ohio Fuel assigned, and the Columbus Company presented, the following classifications and astounding values:

Class 1, Operated,	291,396 acres,	$19,252,029
Class 2, Unoperated,	164,739 acres,	12,274,635
Class 3, Unoperated,	312,631 acres,	5,281,866
Class 4, Unoperated,	2,065,421 acres,	6,195,947
Total	2,834,187 acres,	$43,004,477

(R., 2911.)

The definition of these classes are set forth at R. 3124, and are as follows:

> "Class 1. Leases of tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public.
>
> Class 2. Leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but

which do not have any producing wells drilled thereon.

Class 3. Leases of tracts of land shown by surrounding of neighboring developments of operations, geological considerations, etc., to be reasonably certain to be good gas land, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling.

Class 4. Leases of tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

In the ordinary course of its business Ohio Fuel carries this acreage on its books as just "operated" and "unoperated", but for the purpose of rate litigation it is divided into Classes 1, 2, 3 and 4 on the basis of the foregoing definitions. As a matter of fact, there are really only two classifications and naturally they are the operated leaseholds, in which active wells are located, and the unoperated or prospective or possible acreage.

When a well that produced gas is drilled the entire leasehold upon which it is located, whether it consists of 10 acres or 1000 acres, becomes known as "operated" acreage. (R., 998, 1027.) Dry holes, or non-productive drilling expense incurred in prospecting for gas, are paid for out of revenues as an operating expense and have been so allowed in this case. (R., 179, 217.)

On this total of 2,834,187 acres of mere leases, to which, with the exception of the "operated", consisting of 291,396 acres, it has only the right to enter, explore for

and remove gas if found, Ohio Fuel claimed a value of $43,004,477.00, (R., 2910), which is almost two thirds as as much as the value of all its other properties and demanded a return of 8 per cent. thereon. It also demanded the right to charge to operating expenses delay rentals on the 2,542,791 acres that are unoperated in the sum of $1,684,913.00 annually. (R., 2908.) Of course no Commission or Court could allow such presumptuons claims.

But that is not all. The Columbia System would not only place these entire leaseholds in the rate base at high imaginary values and collect an 8 per cent. return thereon but, while charging the delay rentals to operating expenses, it would also have the consumers pay these values to Ohio Fuel through amortization at 4 per cent. annually over a 25 year period. (R., 2907.) If the company sees fit to fail to renew any of these leases, or to drop any of this acreage for any reason, no adjustment is proposed for the benefit of the consumer; it would have him continue to pay just the same as on the original basis of leaseholds as of the date certain. The utter injustice of this proposal is shown by the fact that although witnesses for the Columbus Company said that all of the unoperated acreage was necessary on December 31, 1929, in 1930 Ohio Fuel abandoned 525,445 acres of this unoperated leased territory. The consumers, it would plainly appear, enjoy a distinct privilege under such a system and that is to be exploited.

There is another matter which should here be remarked although we shall discuss it later. There is a private oil

producing corporation known as The Preston Oil Company operating in Ohio which, like the Columbus Company, Ohio Fuel and United, is a subsidiary of The Columbia Gas and Electric Corporation. As we shall show, the unoperated acreage claimed for this oil company is the same as that claimed by Ohio Fuel, but Ohio Fuel, the public utility, has always assumed the expense of securing all leaseholds for both companies and also the payment of all delay rentals. The Preston Oil Company pays no lease rentals; these have always been charged as an operating expense to the utility. In this situation is found a measure of the reason for the gas company desiring to include vast unoperated acreages in its rate base. (R., 1002-1023.)

Class 1, designated "operated", consisting of 291,396 acres, is the only acreage upon which any wells are located and consequently is the only part of the listed leaseholds in Ohio from which consumers are being supplied with gas. Although not fully drilled, it is the property considered as "actually used and useful", (Section 614-46, G. C., Appendix), by the Commission and Court for the purpose of determining proper rates for the ordinance period in question.

The Record shows that while Ohio Fuel allegedly holds 2,542,791 acres of unoperated leaseholds, it is at the same time purchasing about one-third of its gas from United of West Virginia and approximately a little less than another third from independent producers in Ohio and is thus actually obtaining only about one-third of its

necessary volume from its own Ohio acreage. (R., 2905, 2906.)

How, in the name of reason, can any company demand, much less expect, to saddle 2,542,791 acres of unused leaseholds and 291,396 acres of partially used leaseholds upon the backs of existing gas consumers while it buys almost two-thirds of its supply of gas elsewhere?

Much of this 2,542,791 acres of unoperated leaseholds, if it has gas under it, will be furnishing a supply for the second and third generations of existing consumers' children and others. How can anyone then, except those who have an interest in boosting the price of gas, even profess to believe that existing consumers should be burdened with such a futile load? That is just what the legislature in Section 614-46, G. C., limiting rate base property to "actually used and useful", meant to and does forestall.

The pertinent part of Section 614-46, G. C., is as follows:

> "If the Commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the Commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, * * * fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance. * * *." (Appendix.)

The Ohio Legislature, Commission and Court are in accord that existing consumers must not be burdened with tremendous charges for acreages which are not now, and perhaps never will be, of any use to them.

The testimony of witnesses for the Columbus Company shows that in their opinion Class 1, or Operated Leaseholds, will not be exhausted of gas until long after the end of the ordinance period. Seyffert, on direct examination, said, assuming that Ohio Fuel could buy gas from independent producers and United in the amount that it was then buying, the amount of gas in the ground would be equivalent to about a 10 year period, and that if Ohio Fuel were not able to buy gas from other sources the present supply would be equivalent to a 5 or 6 years supply. Naturally the witness was attempting at that time to minimize the amount of gas to be recovered from Class 1 acreage, but, even actuated by that motive, the best testimony offered was that under present conditions the supply would last for 10 years. (R., 1052, 1053.) The Columbus Company offered no evidence that Ohio Fuel anticipated any change in its source of supplies and there exists no basis for assuming that there will be an alteration of existing conditions. The testimony of Dally and Wittmer estimates a much greater existing supply than that given by Seyffert. (R., 1098, 1164.) Wittmer and others said the probable recovery from Class 1 acreage yet obtainable will reasonably average 4,000,000 cubic feet per acre. (R., 1164.) This would make a total reserve in the operated acreage of 1,165,584,000 M c. f.

Enough gas to last Ohio Fuel for more than 20 years on the basis of its present total annual sales buying none from independent producer or from United.

In our discussion of Amortization we shall show the mistake of the majority Commission in its finding as to the remaining life expectancy of existing wells and its consequent reversal in that matter by the Supreme Court of Ohio. The ordinance period, ending as it does on November 11, 1934; there is no basis whatever for anyone to pretend that existing wells and Class 1 acreage will be exhausted until long after that time. (R., 1136, 1164, 1165, 1104, 1105.)

The evidence discloses that several witnesses say there is a large reserve in the Class 1, or operated, leaseholds. This is, of course, in addition to the life which remains in the presently existing wells. Dally, for the Company, testified as follows:

> "Commissioner Geiger: How long has acreage No. 1 been drawn from, for what period of time, on the average?
>
> The Witness: I don't know what the average is but some of it has been drawn for a number of years.
>
> Commissioner Geiger: I know that, but—
>
> The Witness: A good deal of it lately—later years; not so far back.
>
> Commissioner Geiger: Well, are you prepared to say that in your judgment 90 per cent of the original gas content of acreage No. 1 still remains in the ground?
>
> The Witness: Approximately that amount." (R., 1136.)

He also said that he estimated 4,000,000 cubic feet of gas per acre still remaining in the operated leaseholds. (R., 1098.)

Meals also testified that there was much drilling yet to be done on Class 1 acreage and he had no doubt but what large volumes of gas would still be found on it. (R., 1215.)

The Record very definitely shows that the operated acreage is not fully drilled and, in the opinion of gas men, contains a large reserve within itself in addition to the gas yet to be drawn from existing wells. The Commission and Court had every right to conclude from the evidence that untold quantities of gas may yet be obtained from Class 1 acreage.

In light of the facts and the real situation it does the Columbus Company no credit to pretend that the reversed finding of the majority Commission that Class 1 acreage would be exhausted 3 years and 2 months after December 31, 1929 is correct. It made no such claims or pretentions for Ohio Fuel during the trial of the case. In fact, if its counsel really believed exhaustion of the operated acreage so imminent and immediate, how can they ever justify the purported market value of $19,252,029.00 (R., 2911), for which they then contended? This conflicting and irreconciliable position of the appellant was fully presented to the lower Court.

The Columbus Company pretends to believe Class 2 acreage used and useful because it is being drained seriously by wells located on Class 1, but this is a highly speculative matter about which no one can be certain.

One Company witness even minimized the claim. Daily, for example, testified that he assumed that acreage No. 2 had not been touched, as far as drawing gas from under it is concerned, except where wells in Class 1 might be very close to Class 2, but that Class 2 is not seriously affected. (R., 1136, 1137). Others of the Company's witnesses testified that no one could tell where gas exists or how the pools or pockets may extend except with the point of the drill. (R., 1567).

The Commission, majority and minority, found that Classes 2, 3 and 4 are not actually used and useful and excluded them from the rate base. The majority do so in this language:

> "In the case of the **Logan Gas Company v. The Public Utilities Commission of Ohio**, 121 O. S. 507, what is now known as the operated acreage was there designated 'class number 1', while the unoperated acreage was designated as 'classes number 2, 3 and 4', depending on the relative likelihood of each such class becoming producing acreage. In the case in question it was held by the Supreme Court in a somewhat divided opinion that neither class number 2, 3 or 4 should be considered in fixing the valuation of the property that was then used and useful. The Commission has determined that the acreage at present used and useful by The Ohio Fuel Gas Company in producing gas, a part of which reaches the Columbus gateway, is 291,396 acres."

Under similar facts with the same classification of leaseholds employed in this case, the Supreme Court of Ohio had held in **Logan Gas Company v. Public Utilities**

Commission of Ohio, 121 O. S. 507, at pages 509 and 510, 169 N. E. 575:

> "As to class No. 2, to wit, leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon, the majority of the court are of opinion that, while the leases upon territory of such character may in the future be 'useful', the same do not come within the purview of the statute, which requires the property to be given valuation to be both 'used and useful'. The leaseholds covering such character of territory, not being both 'used and useful', the Commission's views upon that point are affirmed. The judges concurring in this view are Marshall, C. J., Kinkade, Robinson, Matthias and Allen, JJ.
>
> As to classes 3 and 4 all judges concur that the Commission was right in not allowing valuation therefor as property 'used and useful'."

In the case at bar the Court, citing the Logan Gas case, supra, with approval, again sustained the decision of the Commission excluding Classes 2, 3 and 4 leaseholds (non-producing) from the valuation upon the ground that the property was not actually and useful. **Columbus Gas & Fuel Co. and City of Columbus v. Public Utilities Co.**, 127 O. S. 109, . ; 187 N. E. 7. (R., 50, 62, 63.)

The case of **United Fuel Gas Company v. Public Service Commission of West Virginia**, 14 Fed. (2d), 209, was on a bill in equity before a three-judge court to enjoin the Commission from enforcing its order with reference to rates for gas, on the ground that by the orders of the Commission complainants property was being taken

from it without due process of law. The court made detailed findings and denied the application for an interlocutory injunction. One of the main issues was the value of the gas leases. The Gas Company controlled the production of natural gas from 814,910 acres of land. The lower court included in the rate base the assessed value of only 136,384 acres (proven), which were then being used in production, and excluded on the ground that they were not presently used and useful in the public service, 126,208 acres described as probable, and 552,319 acres classed as improbable or unfavorable, valued by the Gas Company at $26,000,000.00. The statutory court said:

> "Among the questions raised by the claim of the plaintiff, that the value of the gas under the various classes of acreage shall be treated as a part of the value upon which it is entitled to a return are: First, What is the amount of gas under each class? Second, What is its present value? Third, How much of that value is presently used in the public service?
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> * * * * * * * * * * * * * *
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> "Its right to relief is nevertheless absolutely dependent upon its being able to maintain the position that it is entitled to a fair return upon the present value of such of its property as is used and useful in the public service. Whether it showed good judgment in acquiring and holding any other property is irrelevant to any issue upon which it here seeks a decree. No part of the gas which is supposed to be under the acreage classed as either probable or possible is 'used' in the public service or for that matter in any other, in any ordinary sense of that word.
>
> "It will be noted that the total of the gas underlying the proven acreage was 249,100,100 M c. f. As the plaintiff sells annually about 47,000,000 M c. f.

of which 10,500,000 goes to the West Virginia retail purchasers, it has under its proven territory gas enough for everybody for more than five years, and an amount sufficient to meet the needs of its public service patrons alone for almost a quarter of a century.

"For the reasons already stated, we cannot see how any other portion of its gas can be held to be used in the public service, no matter how elastic a definition be given to the word 'used'. At the risk of tiresome repetition, we can say that we do not criticize the plaintiff for acquiring any or all its gas rights. It was doubtless wise to get them. All that we decide is that, in arriving at the rate base upon which plaintiff is entitled to a fair return, we may not combine two opposing theories. We are not justified in saying that, because plaintiff's investments in gas reserves were prudent, those reserves immediately went into use, and that, therefore, plaintiff is entitled to have them appraised at the many times higher value it says they now have. If, in dealing with its tangible property, and going concern value, we are required to ignore, except for check purposes, plaintiff's investment in them, we must apply the same rule to its gas reserves."

It will thus be seen that the court decided squarely that only the developed acreage should be included in the rate base, and excluded from the rate base 80 per cent. of the Company's acreage, valued by it at $36,131,865.00.

The decision of the three-judge court, denying an interlocutory injunction, was affirmed by this court, **United Gas and Fuel Company v. Public Service Commission of West Virginia**, 278 U. S. p. 322, 73 Law Ed. 402, 49 S. Ct. 157.

Ohio Fuel has acquired much of its unoperated acreage over and above its requirements for the two-fold purpose of preventing competition and increasing the value upon which rates may be based. If it is able to obtain control of what shows promise of becoming gas acreage it, of course, is able to prevent other companies from coming in and making use of it for the purpose of competition. Quite naturally, if while keeping out competitors it can boost its rate base and compel consumers to carry the load it is in a very formidable position. The company would use unreasonable rates to its customers, based upon alleged value and carrying charges for unused acreage, with which to prevent competition when that very competition would doubtless assure lower rates to gas users. This may be good business judgment on the part of the company, but certainly consumers should not be required to carry such a burden.

The claims of the Columbus Company in this case in behalf of Ohio Fuel demonstrate conclusively the necessity for Commissions and Courts drawing a definite line of demarcation between leaseholds that may be included in a rate base and those that may not be included. Commission regulation will be circumvented, thwarted and eventually destroyed by ambitious and grasping gas companies unless some definite rule of inclusion prevails. The law is clear, the dividing line in Ohio lies between the acreage which is "actually used and useful" and that which cannot be so regarded. This rule has always been applied in Ohio both by Commissions and Courts.

This doctrine has been applied generally. In **Los Angeles Gas and Electric Corporation v. Railroad Commission**, 289 U. S. 287, 305, it was said by this Court:

> "This Court has repeatedly held that the basis of calculation is the fair value of the property, that is, that what the complainant is entitled to demand, in order that it may have 'just compensation', is 'a fair return upon the reasonable value of the property **at the time it is being used for the public**'." (Boldface ours.)

And the following may be mentioned as typical cases:

San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 43 L. Ed. 1154, 1161, 19 S. Ct. 804;

Smyth v. Ames, 169 U. S. 466, 547 L. Ed. 819, 849, 18 S. Ct. 418;

Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 53 L. Ed. 382, 395, 29 S. Ct. 192;

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 434, 57 L. Ed. 1511, 1555, 33 S. Ct. 729;

Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, 262 U. S. 276, 287, 67 L. Ed. 981, 984, 43 S. Ct. 544;

Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625, 631, 67 L. Ed. 1144, 1147, 43 S. Ct. 680;

Bluefield Waterworks & Improvement Co. v. Public Serv. Commission, 262 U. S. 679, 690, 67 L. Ed. 1176, 1181, 43 S. Ct. 675;

McCardle v. Indianapolis Water Co., 272 U. S. 400, 410, 71 L. Ed. 316, 325, 47 S. Ct. 144;

St. Louis & O'F. R. Co. v. United States, 279 U. S. 461, 484, 485, 73 L. Ed. 798, 808, 809, 49 S. Ct. 384.

In conclusion we again invite attention to the inclusion by the Commission, with the sanction of the Court, of dry hole or "non-productive well drilling expense" in-

curred in exploration for gas as an operating expense of Ohio Fuel. In recent years the company claims to have expended amounts as follows for this item:

1927	$495,139.46
1928	557,320.95
1929	618,788.82
1930	635,242.74

City Ex. No. 89, Original.

The figure used in this case is based upon the experience of the company in 1929. (R., 179.)

We further invite attention to the ruling of the Commission that when non-productive acreage is brought into production the cost incurred in carrying it through its non-productive period may well go into valuation and be capitalized. (R., 156.)

The Commission and Court in this case, under the facts and the law, very properly eliminated Classes 2, 3 and 4 from consideration.

2. Delay Rentals on Unoperated Leaseholds—The Ohio Fuel Gas Company.

In Assigned Error 5 (c) the Columbus Company complains of no allowance for the annual rentals paid by Ohio Fuel on its unoperated leaseholds.

Since the unoperated acreage cannot be included legally in the valuation, it follows that the expense of carrying it, known as "delay rentals," cannot be charged as an operating expense against existing gas consumers. The Commission and Court were, therefore, right in eliminating these charges from consideration.

The Commission said:

> "The Commission is of the opinion that inasmuch as the Supreme Court has held that the nonproductive acreage may not be considered in fixing the rate base, it must logically follow that the expense of carrying that nonproductive acreage may not be considered as a part of the maintenance of the system which has at its command other acreage which is actually producing gas and is therefore used and useful. The Commission is in harmony in disallowing as an expense of the company delayed rentals, but is of the view that when this nonproductive acreage is brought into production that the cost incurred in carrying it through its nonproductive period may then well go into its valuation, and be capitalized." (R., 155, 156.)

Commissioner Bricker thus summed up the subject:

> "If this rule were not followed it would be possible for a company, less scrupulous than this one, to pay delayed rentals beyond requirements in order to increase the expenses and upon that basis fix a high rate to the consumer which would have to be approved by a regulatory body and then after the rate had once been established, release the reserve leaseholds, as the Company can do under its contracts and cut down the expenses of the Company, thereby establishing a rate which would be unjust, unfair and excessive to the public." (R., 197.)

The findings of the Commissioners as to delay rentals on unused and unuseful acreage in Ohio were approved by the Supreme Court. **The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio,** 127 O. S. 109, 187 N. E. 7. (R., 58.)

3. Operated Leaseholds.—The Ohio Fuel Gas Company.

In Assigned Error 5 (b) the Columbus Company protests the disallowance of a return upon more than the book value of gas leaseholds classed as No. 1, owned and used by Ohio Fuel as a source of supply of natural gas.

The operated leaseholds of Ohio Fuel on December 31, 1929, consisted of 291,396 acres. A lease constitutes a unit for development; if one producing gas well is discovered on leased premises, regardless of its size, the entire acreage is classified as operated. (R., 1148, 1150.) The fact that it may be still further developed does not change the classification.

The valuation set forth in the Record for this acreage does not include gas well construction or equipment which are separately evaluated and included. (R., 180, 217.)

The royalties paid on Class No. 1, or operated leaseholds, amounting to $538,206.00 annually, are recognized as an operating charge and allowed as part of production expense. (R., 181, 218.)

The leasehold claims were introduced through Seyffert. The values were assigned by Dally, Wittmer, Meals and Webber, and although they did not give any direct testimony on the subject they were produced for cross-

examination. These are the alleged market values the witnesses gave to this Class 1, or operated acreage:

		Value per Acre.
A. B. Dally	$26,225,640	$90.00
Geo. Wittmer, Jr.	21,825,000	74.79
S. W. Meals	17,483,760	60.00
D. S. Webber & Son	11,473,717	39.37
Average	$19,252,029	$66.07

(R., 2911.)

There are good and sufficient reasons for the Commission and Court rejecting both the Company's exhibits and the testimony of their witnesses in respect to these leaseholds and their claimed valuation.

Not one of these men can be said to be disinterested, since all of them are engaged in the natural gas business and it is to the advantage of each of them to boost the value for leasehold acreage as high as possible.

Dally is associated with the Benedum Trees Oil Company, which has recently become connected with the Columbia System. He is an official in a number of natural gas companies and is president of the Penn Oil Gas Company, which is a producing company with approximately 60,000 acres of leaseholds in Ohio, selling gas to the Ohio Fuel. He has been often used as a witness on leaseholds, having appeared in the Iroquois Gas Company case in New York, the United Fuel case in West Virginia and the Logan case in Ohio. (R., 346-350.)

Wittmer is an officer in a number of gas companies and

is a director and treasurer of the Wittmer companies. These companies possess about 100,000 acres of leaseholds in Ohio. They sell gas to utilities and Ohio Fuel is among their customers. He has also often appeared as a witness, testifying for the Philadelphia Company, the People's Natural Gas Company of Pittsburgh and the Iroquois Gas Company of Buffalo. (R., 351-354.)

Meals is president of the Carnegie Natural Gas Company and had a personal interest in leaseholds in Ohio in 1929 and 1930 and still held such interests when he testified. He has been widely used in gas litigation, having appeared for the Philadelphia Company, the People's Natural Gas Company, the Iroquois Gas Company and the Logan Gas Company. (R., 355-358.)

Webber was for 15 years an employee of the Ohio Fuel and at this time is a stockholder of the Columbia. He is also personally interested now in a number of leaseholds in Ohio. He too has become rather professional as a gas witness, appearing in the Logan, Dayton Light and Power, Iroquois and the East Ohio cases. (R., 359-360.)

The position of these men is well expressed in the following opinion:

> "These business witnesses are all highly competent men. Every one of them is, however, interested in natural gas companies. Perhaps it would not be unnatural to suspect that they are inclined to think well of properties similar to that of which they are part owners. It is scarcely possible that their judgment remains altogether uninfluenced by the fact that the judicial decision of some of the questions

raised in this case may be of great importance to their own companies."

United Fuel Gas Company v. Public Service Commission, 14 Federal (2nd), 209.

The attention of the Court is invited to the great difference in value assigned by these men. Between the lowest guess and the highest guess there exists a spread of almost $15,000,000.00, and bear in mind that this is on only the 291,396 acres. Between the lowest and the next highest there is a chasm of more than $6,000,000.00 and between the lowest and the third highest there is a divergence of more than $10,000,000.00. This proves in a convincing manner the non-existence of a leasehold market. If there were anything like an exchange market the value of these leases could be given by disinterested men acquainted with such matters so that only reasonable differences would separate their estimates. It would not be a matter of mere guess and hazard but something upon which well-informed men could not possibly disagree so widely.

Now and then there are in Ohio a few isolated transactions in which comparatively small tracts of gas leaseholds are bought and sold, but there has been no such open dealing in these properties as is necessary to establish anything like defined or trustworthy market values.

A studied effort was made by these leasehold witnesses to escape the fatal features of so-called market value testimony which has been found prevalent in such matters in every well considered decision of courts and

commissions, but nevertheless they could not conceal the fact that their estimates of purported market value of the leaseholds was bottomed upon some guess or assumption as to the quantity of recoverable gas under the leases and the possible value of that gas at some assumed price in some existing regulated or imaginary unregulated market. The evidence is indeed so speculative and vague that it is unreliable in fact and incompetent in law.

There exists a very important encumbrance upon these leaseholds arising out of the public utility obligation resting upon them, but the witnesses, in placing a so-called market value upon them, gave it no consideration. On this point in the **City of Charleston v. Public Service Commission**, 110 W. Va. 245, P. U. R. 1931E, 74, the West Virginia Court of Appeals said at pages 81-82 (P. U. R. citation):

> "That value was placed on the leaseholds by witnesses who had in mind chiefly an unregulated use of the gas. However, the leaseholds are subject to the requirements of the public. This subjection constitutes a 'genuine encumbrance' (Dr. Gray, economist) which conceivably might impede the sale of the leaseholds on the open market. See opinion of Mr. Justice Stone in United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S. 300, 317, 73 L. ed. 390, P. U. R. 1929A, 433, 49 Sup. Ct. Rep. 150. The witnesses did not take into consideration the far reaching effect of this incumbrance, but for rate-making purposes the incumbrance must be considered."

This situation alone, to make no mention of intercorporate connections, clearly indicates that the alleged

offer of Benedum-Trees Oil Company to Ohio Fuel was a mere sham and the Commission committed no error in refusing to permit it to become a part of the Record because it held no evidentiary value.

It is, of course, important to understand how the witnesses arrived at their final figures of value.

Upon cross-examination Dally testified as follows:

> "Q. Mr. Dally, what were the controlling factors considered by you in arriving at the value of this leasehold acreage? A. Starting with the acreage which had been drilled, I considered the wells in their production, the rock pressure, the amounts of gas that they had produced or were producing, against the conditions named in the record here; their location on the territory. That was the general conditions. (R., 1093.)
>
> Q. And what would govern them after getting the substantial gas content? What would then govern, what you could get for it in the market? A. Well, of course the test of that is the rate or price you get for the gas and that rate or price is minus all the things that it takes to operate a gas company, including the dry holes that I mentioned this morning and the hazards, all has to go in against that whatever the charges are. Then you arrive at what you can afford to sell that gas per thousand at in the market." (R., 1094.)

Further cross-examination showed that Dally figured the valuation he assigned to the leaseholds by considering the possible gas content of the acreage and an estimated rate for gas as a competitive fuel in a fancied unregulated market. (R., 1128, 1129.) In this the witness unwittingly ran afoul of one of the weaknesses of the United Fuel gas case. His answers conclusively prove

an inadmissable assumption within the rule laid down by Mr. Justice Stone when he said:

> "It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause, Pennsylvania Gas Co. v. Public Service Comm'n. 252 U. S. 23; Public Utilities Comm'n. v. Landon, 249 U. S. 236, or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product, limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make in admissable the assumption that the price to consumers would remain unregulated elsewhere."
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> **United Fuel Gas Co. et al. v. Railroad Commission of Kentucky**, 278 U. S. 300, at p. 417; 73 L. Ed. 390; 49 S. Ct. 150.

Such testimony possesses no probative value.

Later in his testimony Dally said he considered Class No. 1 still 90 per cent. good, (R., 1136), and, allowing for the gas that had been taken out of this operated acreage, he had estimated a remaining 4,000,000 cubic feet per acre. (R., 1098.) Having thus estimated the probable gas content of the territory and considered the price for which he could sell the gas, Dally arrived at his figure for the value of the property. (R., 1098-1101.)

In the cross-examination of Wittmer it developed that

he too had taken into consideration the probable amount of gas in the acreage in order to determine the value. (R., 1158.) He said the recovery, in his opinion, would vary from 2,000,000 to 10,000,000 cubic feet per acre with an average of 4,000,000 cubic feet per acre, (R., 1164), and the value given the leaseholds was calculated upon the highest price he could hope to obtain for the gas in an unregulated market. (R., 1171-1172.) There is virtually no unregulated market in Ohio, because when a company supplies natural gas to more than one consumer, domestic or industrial, it is a public utility subject to regulation. G. C. 614-2, 614-2a, 614-3, Appendix. The vague market to which he referred was never named. The Wittmer companies, of which he is treasurer, sell their gas to Ohio Fuel and other utilities at 18 cents per M c. f. and Wittmer himself admitted that it was a fair price and that these companies were getting along alright. (R., 1204, 1205.)

The witness Meals said that he arrived at his figure of value in almost the same way. (R., 1221, 1222.) He was sure he could sell the gas from this acreage in some markets for more than 15 cents or 18 cents per M c. f. but added, "I don't know where." (R., 1223.) And yet, when he attempts to place a market value on leaseholds for rate purposes he employs a 20 to 25 cent rate per M c. f. at the well and a higher rate to be obtained in some mythical unregulated market. (R., 1224.) The premise upon which such a market value is figured is conjectural and speculative, to say the least.

Webber, too, took into consideration the probable gas

content of the acreage and the price that he could get for it. (R., 1284.) He admitted that Pittsburgh is occupied but named the distant eastern towns of Rochester and Buffalo as possibilities for industrial gas. He further stated that the Iroquois Gas Company was already furnishing service in that field. (R., 1288, 1289.) And still further on he related that he had in mind, if there was a sufficient amount of proven acreage acquired, going to some town and, if possible, securing a franchise to go into that town and supply it with gas. This would certainly presume selling in a regulated market. (R., 1291, 1292.) He also admitted, as did the other witnesses, that he knew of no transactions in Ohio involving leasehold acreage of the extent, quality and character of those of Ohio Fuel. (R., 1289.) Thus the so-called market value of this witness was also speculative, conjectural and indefinite.

Since all of these witnesses estimate the gas content in the ground and the price which may be obtained for the assumed volume in an imaginary market, and upon those bases presume to set a so-called market value for the leaseholds while similar properties similarly situated are not being exchanged, as is shown by the evidence, the method and result do not differ from those found in causes where the testimony has been held wholly incompetent.

We submit that there is no market and that the bases assumed by these Company witnesses were wholly speculative and uncertain, but that, even though there were a market, the value of the lands for rate purposes could

not be established by what they would bring in exchange. They are being used in a regulated business where rates cannot be built up by employing a value that depends on earning capacity. Under such a system the value is based on the earning capacity and the earning capacity on the value and the result is a vicious circle. Courts have almost unanimously rejected such methods of valuation.

In the case of **United Fuel Gas Company v. Railroad Commission of Kentucky**, 13 Fed. (2nd), 510, the utility sought to prove the so-called market value both by the testimony of geologists and engineering experts and by the testimony of men experienced and interested in the production and marketing of natural [redacted] who purported to assign to the leaseholds a market value or exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. In the course of his opinion holding that such testimony was incompetent and that the only competent testimony in the record was the book value, Judge Hickenlooper, at page 519, among other things, said:

> "The other witnesses for the complainants arrive at their valuation upon the exchange value basis. Both methods have in contemplation the value of the use, and both consist of capitalizing the earning power of the properties in arriving at their value. The fallacy of this argument, that, because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis for another calculation of a still larger return, would seem quite apparent. The fallacy of valuing the use upon the earning capacity, and then fixing rates upon the value thus determined, has been ob-

served by Mr. Justice Hughes in the Minnesota Rate Cases, 230 U. S. 352, 461, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in the Southwestern Telephone Co. case, supra. See also the following cases, to the effect that earning power, in the sense of good will or franchise value, must be excluded from consideration in arriving at the rate base: Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 29 S. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 S. Ct. 389, 56 L. Ed. 594; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165, 35 S. Ct. 811, 59 L. Ed. 1244; Galveston Electric Co. v. Galveston, 258 U. S. 388, 396, 42 S. Ct. 351, 66 L. Ed. 678; Georgia Railway v. Railroad Commission, 262 U. S. 625, 632, 43 S. Ct. 680, 67 L. Ed. 1144.

"The language of the Supreme Court of Appeals of West Virginia upon this question seems peculiarly apt: 'However, as we interpret those cases, the "present fair value" for ratemaking purposes does not mean the market value of the property as determined by the rate of return, or as based upon earnings when the reasonableness of the return or earnings is in question. If it does, then an increase in rates would increase the market value of the property, and that would again call for further increase. This would recur again and again; rates increasing values, and increased values requiring increased rates, would follow each other, to avoid confiscation under the Constitution. This vicious pyramiding would go on and on, until the point would be reached where the public would cease patronizing the utility rather than pay the price. The net result would be that the public would always be compelled to pay "all the traffic would bear," and governmental regulation of the prices to be charged would be at an end. Its only function in that respect would be to prevent discrimination.' City of Charleston et al. v.

> Public Service Commission et al., 95 W. Va. 91, 120 S. E. 398. Innumerable other authorities are cited by counsel for the municipalities to the same effect, but the situation would appear to be too clear for extended discussion."

The decision of the statutory court on this point was sustained in **United Fuel Gas Co. v. Railroad Commission of Kentucky, supra,** where Mr. Justice Stone in commenting upon both types of proof offered by the utility, said at page 316:

> "Appellants' second class of expert testimony is that of men experienced and interested in the production and marketing of natural gas, who purported to assign to appellants' gas field what was described on the argument as its present exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. Three such witnesses testified to a present value of appellants' gas field in amounts varying from $30,000,000 to $35,000,000 and a fourth fixed the value at $45,000,000. Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period."

And it was further held at page 317:

"Waiving these not inconsiderable difficulties in the way of establishing value, we pass to another and more serious difficulty. In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity, and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value."

In the **Logan Gas Company et al. v. Public Utilities Commission of Ohio**, 124 O. S. 248, 249, 177 N. E. 587, the Supreme Court of Ohio, in discussing evidence of this character, said:

"In hearing the evidence and in arriving at a conclusion as to the market value of the leaseholds in question, the Commission was not convinced of the probative value of evidence of market value testified to by the company's experts, because such evidence necessarily was not and could not be based upon the price such property would bring in the open market, with a willing seller and a willing buyer, there being no such market by reason of the system of organization and operation of the Logan Gas Company and other gas companies; that each company in its own field constitutes, in effect a monopoly; that actual value depends upon the company's earning capacity, based upon the price which the company is willing or obliged to pay for the gas in the ground, the cost of production and distribution, and the price the Commission will allow it to charge the consumer; that to base market value upon such premises was but in a large measure to base it upon the very rate which the Commission was seeking to determine."

The majority Commission, in passing upon the competency of the testimony of these witnesses, used the following language:

> "Manifestly the present value depends upon the quantity of gas below the surface, and as gas is withdrawn, the acreage becomes less valuable in proportion that the withdrawn gas bears to the gas still to be captured."
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> * * * * * * * * * * * * *
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> "We are at once confronted with the question of the probative value of evidence touching the market value. Such evidence could not be based upon the price between a willing buyer and a willing seller. In the very nature of the operation, companies have a monopoly within their own field, and further the value of the land in the market would depend upon the price which the regulated company may be permitted to charge to its customers. A market price could not be fixed where the value would be dependent upon the rate which could be charged when that rate is within the control of a regulatory body and should depend upon the value of the land. To say that the value of the land is to be determined by the rate at which the gas may be sold, and that the rate for which the gas may be sold depends upon the value of the land is reasoning in a circle, and such testimony can be of but little value." (R., 153.)

The Supreme Court of Ohio affirmed the action of the Commission in rejecting the testimony of the witnesses for the Company and held that no market value was established. But the Court found it necessary to reverse the Commission because of the arbitrary nature of the value which it did assign.

In order to portray the price per acre which the Company was paying for acreage that it was classifying as

No. 1 in 1927, 1928 and 1929, Blundon, for the City, made a compilation from the records of the Company, as disclosed in Company Exhibits 146, 147 and 148 and City Exhibits 71, 72 and 73, which he presented as pages 24 and 25 of City Exhibit 115. (R., 3187, 3188, 3189.) The considerations shown on these pages are conclusive proof of the average price that was paid farm owners during the three years immediately prior to the date certain of this appraisal. The average price actually paid was from 62 cents per acre to $2.05 per acre. (R., 1418-1420.) These costs were a part of the average included in the summary of total cost of Class No. 1 acreage. Pages 2 and 3, City Ex. No. 86. (R., 3165.)

The transactions analyzed are convincing as to the Company's ability to obtain gas acreage in production areas at a very moderate cost. A similar situation was brought to the attention of the Federal Court when it thus expressed itself:

> "The Record discloses no evidence that even in the proved and producing territory, leases which expire cannot be renewed upon identically the same terms, or that new leases may not be obtained upon such terms in territory as it is proved and comes into production. The conditions of rental seem to be standardized and the terms to be considered mutually fair, the return to the lessor adequate. Under such circumstances the best, if not the only, evidence of value in the Record is the investment value."
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> **United Fuel Gas Company, et al. v. Railroad Commission of Kentucky, et al.**, 13 Fed. (2nd), 510 supra.

The book value carried on Ohio Fuel's record, including the unoperated as well as the operated acreage and also deliberate write-ups made after some special appraisement, is set forth on page 1, City Ex. No. 89, Original. For all leaseholds, minus the deliberate write-ups of 1918 and 1919 amounting to $3,748,036.00, the total book value is found to be $4,730,244.00. The value of the operated or used and useful acreage is obviously less than that amount.

The Commission turned entirely from the Record in the case and assigned a value to the leaseholds based upon foreign facts. Its finding is as follows:

> "The Supreme Court in the Logan case above referred to sustained the Commission in fixing the value of the Logan property, which is now a part of The Ohio Fuel property, at $25.00 per acre, which value was arrived at by the Commission in that case (124 O. S., 248), under mandate from the Supreme Court in the first Logan case, 121 O. S. 507. The Commission, on full consideration of all the evidence offered touching the value of the gas acreage in active operation, and giving consideration to its enhanced value due to delayed rentals which the Company paid before such acreage came into the classification of 'used and useful', fixes the value at $25.00 per acre. This valuation is approximately $2,500,000.00 more than the present book value." (R., 154.)

The Commission was wholly right in denying the excessive claims of the Company for Ohio Fuel but its finding in the premises is arbitrary and erroneous. It fixes the value at $25.00 per acre, and the total valuation of used and useful leaseholds at $7,284,900.00, which, as it

says, is $2,500,000.00 more than the present book value as shown by the books of the Company, but it did not add, as it should have added, that the book value figure to which it referred included the whole 2,834,187 acres of leaseholds, and that the book value of the operated acreage is something less than that amount.

The $25.00 per acre fixed as the value of the Logan property, as of December 31, 1924, was practically an arbitrary valuation, although a little color for the use of the figure was found in the record from the testimony of certain witnesses that it was the amount used per acre for certain of the leaseholds in question by certain of these companies dealing between themselves. There is nothing of that nature in the Record in this case.

The Supreme Court of Ohio, in reviewing the evidence and the ruling of the Commission in the present case, said:

> "The next question which arises is as to the fair valuation of the leaseholds owned by the Ohio Fuel Gas Company and used in the conduct of its business. This court has held in a previous valuation case that the method of using cost to determine value of leaseholds did not give due regard to the value of the property used and useful. No valuation can be based upon market price because of the fact that there is no market for a gas property so extensive as that of the Ohio Fuel Gas Company.
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> In the case of Logan Gas Co. v. Public Utilities Commission, 121 Ohio St., 507, 169 N. E., 575, classes 2, 3 and 4 leaseholds (non-producing) were excluded from the valuation upon the ground that the property was not used and useful, and that decision was sustained by this court. In the case of Logan Gas Co. v. Public Utilities Commission, 124 Ohio St., 248,

177 N. E., 587, this court in a per curiam opinion sustained the commission in basing its valuation of class No. 1 leaseholds (producing) under Section 499-9, General Code, upon book value and not upon market value. Because the valuation found in the Logan Gas Company case was $25.00 per acre, both the majority and the minority of the commission in this case fixed a valuation upon class No. 1 leaseholds (producing) of $25.00 per acre, it being conceded in each finding that this valuation is approximately $2,500,000 more than the present book value of all leaseholds of the Ohio Fuel Gas Company and the Logan Gas Company combined, eliminating, as stated in the minority opinion, the 'arbitrary write up' of approximately $3,700,000 in the Logan Gas Company's leaseholds made during 1919. In valuing these leases at more than the book value under this record, the commission was in error. The commission was also in error in including in its valuation the book value of all leaseholds. Only the present book value of class No. 1 leaseholds (producing) may be allowed."

Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 127 O. S. 109, 187 N. E. 7, P. U. R. 1933D, 238. (R., 62.)

The language of Mr. Justice Stone in the United case, supra, is here applicable.

"On the Record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence pre-

sented cannot reasonably be fixed at any higher figure."

United Fuel Gas Company, et al. v. Railroad Commission, 278 U. S. 300, at page 318.

Finally the Ohio Court concluded with the following statement:

"It was held in United Fuel Gas Co. v. Kentucky R. Commission (1925) 13 F. (2d) 510, that for rate base purposes, gas acreage belonging to a natural gas company should be valued at its book value rather than on the basis of its earning capacity. The court adverts to the fallacy of the argument that because of the earning capacity and large return allowed the property has greatly increased in value, and that such increased value should thereupon be taken as the basis of another calculation of a still larger return. The holding of that case was affirmed by the United States Supreme Court in the case of United Fuel Gas Co. v. Kentucky R. Commission, 278 U. S. 300, 73 L. ed. 390, P. U. R. 1929A, 433, 49 S. Ct. 150.

This same fallacy has been pointed out by Mr. Justice Hughes in the Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 67 L. ed. 981, P. U. R. 1923C, 193, 43 S. Ct. 544, 31 A. L. R. 807.

The court in United Fuel Gas Co. v. Kentucky R. Commission, supra, felt itself constrained in the absence of market value and under the rule just stated that earning capacity should not be taken into consideration for establishment of the rate basis, to hold that the best, if not the only evidence of value in the record, was the book value.

> In view of this holding of the United States district court, and the specific holding of this court, in Logan Gas Co. v. Public Utilities Commission, 124 Ohio St. 248, 177 N. E. 587, we hold that the value of class No. 1 leases should be reduced to book value, and reduced to the book value of class No. 1 leases alone."
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> **Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio**, 127 O. S. 109, 187 N. E. 7, P. U. R. 1933D, 238, supra. (R., 63.)

No proof was offered by the Columbus Company as to the value of the leaseholds of Ohio Fuel which in any way assisted the Commission or gave it any right to complain concerning the action of the Commission or the Court.

4. Gasoline Extraction and Oil Production of The Preston Oil Company in Conjunction with Ohio Fuel.

A complete understanding of the subject of leaseholds and the purported high cost of gas production to Ohio Fuel clearly requires an acquaintance with the relationship of The Preston Oil Company to that company.

The Columbia Oil and Gasoline Corporation was incorporated under the laws of the state of Delaware just prior to 1930 "for the purpose of consummating the plan of reorganization adopted by Columbia Gas and Electric Corporation for the segregation of the oil and gasoline properties and subsidiaries of that corporation from their public utility business." (R., 3039-3092.) The Preston Oil Company, sometimes referred to merely as

the Preston, is its Ohio representative. It operates upon the Ohio Fuel properties in oil production, gasoline extraction and the like, for the benefit of the parent company and its stockholders but at the expense of Ohio Fuel gas consumers and customers.

The Preston is almost a fiction. It is a corporation having the same officers, occupying the same offices, and using the same properties largely as Ohio Fuel. (R., 995, 1030.) It is a mere cog in the Columbia System machinery. Seyffert, treasurer of Ohio Fuel, upon cross-examination, testified as follows:

"Q. Who is the president of the Preston?
(Objection.)
A. Mr. Cross.
Q. Who is president of the Ohio Fuel Gas Company? A. Mr. Cross.
Q. And you are treasurer of each of these companies?
(Objection.)
A. Yes, sir.
Q. Who is the secretary of each company?
(Objection.)
A. P. A. Alberty.
Q. Who is the chairman of the board?
(Objection.)
A. Fred A. Crawford." (R., 1019, 1020.)

In City's Exhibit No. 15, page 6, Original, it appears that the address of both Ohio Fuel and the Preston is 99 North Front Street, Columbus, Ohio.

For the purpose of gasoline extraction the Preston uses all of the wells, gathering lines, transmission lines, compressor stations and gas of Ohio Fuel without pay-

ing one cent for the use thereof, except 23.36 cents per M c. f. for gas used in running its extraction plant. (R., 989-991.) In City's Exhibit No. 15, Original, the Gasoline Extraction Agreement between Ohio Fuel and Preston, dated December 31, 1929, there is, on page 4, this statement:

> "All gasoline and other hydrocarbons so extracted shall belong to the gasoline company."

For the purpose of oil production Preston has been given oil rights in all of the acreage of Ohio Fuel. This provision is found in what is termed "Operating Agreement between The Ohio Fuel Gas Company and The Preston Oil Company," dated December 31, 1929. (City's Exhibit No. 16, Original.) These are not new arrangements, however, for similar intercorporate agreements have long existed between them. Apparently all of the drilling for both Ohio Fuel and Preston is done by Ohio Fuel and Preston considers as its own only that drilling which is done in further development of proven oil leaseholds that have been transferred from Ohio Fuel to Preston, a very small amount of only about 71,000 acres.

Plainly, as we shall see, Preston is a non-hazardous oil and gasoline producing company. It was conceived as a "sure thing" and has been so operated.

The facts relating to these companies were not offered by the Columbia System although it seeks to establish the fairness of a 45 cent gate-rate while attacking the Columbus 48 cent municipal ordinance. The City fought every inch of the way to draw out the story and possibly

much has been withheld. The Record shows a continuous effort on the part of the Company to withhold the facts. A witness for the Company almost diverted the City and the Commission from the importance of the Preston and its Ohio Fuel relationship.

The picture of this intercorporate mingling of public and private business at the expense of the public is one that the Company does not wish to have etched in straightforward lines. Seyffert, when first cross-examined concerning Preston, testified that since January 1, 1930, it has not been affiliated with the Columbia System, but upon further cross-examination, in connection with City Exhibit No. 21, Original, which is the Columbia System Annual Report for 1930, it was developed that the Preston stock had been transferred by the Columbia System to the Columbia Oil and Gasoline Corporation but with the Columbia System in complete control of Columbia Oil and Gasoline, through the distribution of its common stock to the Columbia System stockholders, through a voting trust for that common stock and through the ownership of its preferred stock, to which voting rights might be granted at any time. (R., 1002, 1003.)

The Voting Trust Agreement is City's Exhibit No. 22, Original. And who are the Voting Trustees? George W. Crawford and Philip G. Gossler, key men of the Columbia System, who could extend their own life and grant voting powers even to the preferred stock. (R., 1002.)

With the Columbia System owning all of the stock of Ohio Fuel and also owning or controlling the stock of

Columbia Oil and Gasoline, it does not matter to the parent company whether the profits of Preston come to it directly or through Ohio Fuel or through Columbia Oil and Gasoline.

In 1929 Preston claims to have sold 8,505,381 gallons of gasoline, receiving therefor $686,393.20, and in 1930 it claims to have sold 6,365,968 gallons for the sum of $422,327.97. City Exhibit No. 18A. In the same Exhibit the Preston set forth as investment for gasoline purposes for the year 1929 $1,360,987.51, and for the year 1930 $1,252,711.36. (R., 3085, 3086.)

The law applicable to gasoline extraction is well established. Extraction is a process of taking gasoline from the natural gas that flows from the field to the consumer. In the production of this gasoline joint use is made of the gas, gas fields, lines, compressor stations and other facilities of the gas company. Large profits are generally realized from this gasoline business and Ohio Fuel should enjoy a handsome return from this enterprise. The contention that Ohio Fuel is sufficiently compensated by the improved condition of the gas is "sounding brass and tinkling cymbals."

Under a somewhat similar set of facts this Court, in **United Fuel Gas Co. et al. v. Railroad Commission of Ky., et al.**, 278 U. S. 300, 321, P. U. R. 1929A, 433, pages 448, 449, 73 L. Ed. 390, 49 S. Ct. 150, held:

> "* * * It is not without significance that the West Virginia court in considering this question had before it previous findings of its Commission, based upon actual contracts for gasoline extraction, where the parties, dealing at arm's length, had agreed upon

a 50 per cent. division. Credible evidence was introduced below tending to show that expenses on property used jointly by the two companies and properly allocable to the gasoline company had been borne by the gas companies to an amount in excess of the return received by them from the gasoline extraction. It likewise was shown, the evidence not being challenged by appellants, that the extracting company, during the years 1917 to 1922 inclusive, after allowing appellants 50 per cent. of the net earnings for the extraction privilege, would have earned not less than 102 per cent. of its capital investment in each year. The average yearly profit during this period was 119.75 per cent. In 1923 its net return on this basis was 80.40 per cent. Making allowances for fluctuation in market prices and other common business hazards, we do not think it would be difficult to induce capital to seek investment on the basis of this division of net earnings. In such circumstances we think no adequate reason is shown for not including in the appellant's earnings 50 per cent. of the net proceeds from the gasoline extraction."

The instant case differs from the Kentucky case since The Columbia Gas and Electric Corporation is the one controlling stockholder of Ohio Fuel and The Columbia Oil and Gasoline Corporation and all stock of Preston is held by The Columbia Oil and Gasoline Corporation. We submit that the entire net proceeds of the gasoline extracted by Preston from the gas sold by Ohio Fuel should have been included in the earnings of Ohio Fuel because this amount is an additional profit to that otherwise shown by Ohio Fuel.

With much persistence the City succeeded in establishing the fact that the acreage of Preston is only that

which is now held by Ohio Fuel and that which has been transferred from Ohio Fuel to Preston. (R., 995.) This pertinent statement was made by Seyffert for the Company on cross-examination:

"Q. I note that the operated acreage of the Preston for 1929 was 71,000 acres plus, and 63,000 acres plus in 1930, while the unoperated acreage in 1929 was 2,841,330 acres and in 1930, 2,395,813 acres, and you have your operated acreage divided by counties and your unoperated acreage not allocated to counties—and I am finding no fault with that because that doubtless would have required a good deal of time; now do any of these Preston acreages overlap the Ohio Fuel acreages?

(Objection.)

A. Yes, sir.

Q. To what extent?

(Objection.)

A. Practically all of it, as I testified a day or two ago.

Q. Well, I don't think I caught that; in other words, the acreage roughly speaking, is the same?

(Objection.)

A. Yes, sir.

Q. But the Ohio Fuel has the gas rights and the Preston the oil rights?

(Objection.)

A. That is right.

Q. Well, were they taken that way or how did that come about, or has that been by transfer of some sort?

(Objection.)

A. That has been by transfer." (R., 1014-1016.)

The unoperated acreage claimed for Preston is just that possessed by Ohio Fuel, but what is more important, Ohio Fuel assumes the expense of securing and paying

for both companies all rentals on all of these leases. Preston pays no delay rentals. (R., 1031.)

The witness would have us believe that when an oil well is transferred to Preston it returns to Ohio Fuel the cost of the well and all back rentals from the beginning, but he has uncertain knowledge of the transaction. (R., 1008-1011.) The details of these matters remained hazy although clarification was demanded by the City. Ohio Fuel sometimes agreed that Preston need not reimburse Ohio Fuel for back costs and back rentals on the leases Preston was receiving. In City Exhibit No. 16, Original, at page 5, we find this provision:

> "All rentals and other charges due on or before December 31, 1929 shall be at the cost of the Gas Company and the Oil Company shall not be required to reimburse the Gas Company for the payment thereof."

The transaction in this matter between Ohio Fuel and Preston is peculiar. It is a little singular that the oil rights in all of this acreage should have been sold by Ohio Fuel to Preston for the small sum of $163,635.00. The Columbus Company claimed that the gas rights in this same property for rate-making purposes, as of the same date, were worth $43,004,477.00. (R., 2911.) The purpose of this alleged sale was to eliminate the necessity for Preston reimbursing Ohio Fuel for delay rentals paid on oil producing property before December 31, 1929, which did not come into production through oil discovery by Ohio Fuel until after that date. It is apparent that this meant a big saving to the Preston Company.

The operating agreement provides that where oil is found the oil company shall purchase and pay for the well and reimburse the gas company for rentals accruing after December 31, 1929 only.

This is conclusive proof that Ohio Fuel is over-generous with Preston in collecting back rentals and previous costs even in turning producing oil wells over to it.

For delay rentals Ohio Fuel and Logan paid $1,681,071.19 in 1929, Ohio Fuel paid $1,888,517.22 in 1930. These sums were charged to operating expense of the utility. The Preston Oil Company, enjoying the same acreage, has paid nothing. (City Ex. 89, Original, page 1.)

Ohio Fuel in the two years transferred 49 oil wells to Preston and paid for 242 dry holes, while Preston transferred only 9 gas wells to Ohio Fuel and had 30 dry holes. (R., 3106, 3107.)

Ohio Fuel thus did practically all the gambling in respect to drilling. The reason is obvious. If Preston drilled a dry hole it was a loss, but when Ohio Fuel drilled a dry hole it was charged to its operating expenses as a utility company. (R., 1021, 1036, 1037.)

How can anyone seriously contend that an exchange of oil wells discovered by Ohio Fuel, operating 291,396 acres, for gas wells discovered by Preston operating only some 71,000 acres, can be fair to the former company? Ohio Fuel drills widely and strikes many oil wells but the oil company drills limitedly and almost entirely in proven oil territory and naturally finds few gas wells. The dry hole expense is thus saddled almost entirely on

Ohio Fuel while Preston sits and waits for producing oil wells to be practically given to it.

The acreage contributed under the operating agreement of these companies is not only incomparable but the amount of drilling is clear out of proportion and in no way comparable and the respective rights of the two companies would appear to be in no way mutually reciprocal. Ohio Fuel has received virtually no benefits from its relationship with The Preston Oil Company and every advantage possible has been given to the private sister company.

There are so many phases of the Preston operations that we find it impossible to comment upon all of them, but there is one which we must mention.

In addition to donating all of its gasoline to Preston, Ohio Fuel, while contending that a 61 cent gate-rate is proper throughout Ohio, charges Preston only 23.36 cents for the gas used in making gasoline. City Ex. No. 15, Original. (R., 990-993.)

It will require a vivid imagination to figure out ways and means by which Ohio Fuel could be more generous to Preston.

The earnings from oil production are of more importance than those from gasoline extraction. Including a value for Ohio Fuel leaseholds, the Preston claimed a valuation for the property, plant and equipment of $10,632,924.00 for 1929 and of $10,745,221.86 for 1930. Preston's outstanding securities consist of $2,000,000.00 in common capital stock and after generous allowances for taxes, depreciation, amortization, interest and other

reserves, it declared dividends of $2,080,000.00 in 1929 consisting of $1,286,822.00 from current earnings and $739,178.00 from surplus, which is more than a 100 per cent. return, and in 1930 it declared dividends of $1,411,621.84 consisting of $1,263,489.00 from current earnings and $148,132.00 from surplus, which is almost a 75 per cent. return. (City Ex. Nos. 23, 36, 37. R., 3105, 3108.) It is significant that this Company, claiming a book value of $10,632,924.00 in 1929, should have outstanding securities consisting of a total of only $2,000,000.00 in common capital stock and that all of it should be held by The Columbia Oil and Gasoline Corporation, a Columbia Gas and Electric Corporation subsidiary. Clearly these profits are not possible except at the expense of Ohio Fuel.

In all fairness, the net profits of The Preston Oil Company should be credited against the operating expenses of The Ohio Fuel Gas Company.

By failing to recognize this situation and give due effect to it the Commission was overgenerous to the appellant.

5. Gas Well Construction and Equipment Depreciation —The Ohio Fuel Gas Company.

The Columbus Company, in Assigned Error 5 (e), complains of the fixing of the value of gas well construction (Account No. 211) and gas well equipment (Account No. 212) of Ohio Fuel by deducting from the reproduction cost of said property an amount for depreciation

based upon the percentage of decline in rock pressure of existing gas wells.

No mention of the United is made in this connection because the method employed by the Commission, and not disturbed by the Court, is the same as that adopted by the Commission and Court in the United case, the record of which proceeding is a part of the record in this case, and the method is also the same as was employed for construction by the Columbus Company's own engineers of their own volition in that litigation.

The Columbus Company's engineers, Ford, Bacon and Davis of New York, determined the depreciation of these accounts in this case by partial inspection and observation, while Blundon, City engineer, based his depreciations upon the gas well's decrease in rock pressure just as was done in the United case.

The most interesting part of the discussion of counsel for the Company is their justification for depreciating the well itself, that is, "the hole in the ground", by observation rather than by the depletion of gas, when obviously even the utility experts cannot view that hole.

All of the Commissioners accepted the City's depreciations and refused to follow the Columbus Company and its experts. The majority opinion merely accepts the City's depreciations, but Commissioner Bricker said this in his opinion:

> "Mr. Blundon's depreciation figure of gas wells was based upon the commonly accepted practice among engineers of determining the per cent. condition from the rock pressure showing at the initial flow and at the time of the appraisal. This is the

method used by Ford, Bacon and Davis, the Company's appraisers in this case, in the United Fuel case and was the method under which Ford, Bacon and Davis were proceeding in the Ohio Fuel Gas case until, according to the testimony of Mr. Weymouth, he convinced them that a different method should be used, which would bring about a higher per cent. condition and therefore a higher valuation.

Considering that Mr. Weymuth further testified that he favored another method of depreciation, even giving a higher valuation than that given by Ford, Bacon and Davis and the fact that the rock pressure method is an old established one used in determining depreciation of gas wells and that it has been adopted heretofore by Ford, Bacon and Davis, I accept the rock pressure method as used by Mr. Blundon and apply the same to the valuation of the gas wells fixed by the Commission." (R., 202, 203.)

The depreciation of gas wells involves two accounts, the gas well construction account and the gas well equipment account.

The gas well construction account relates to "the hole in the ground", while the gas well equipment account includes the material involved in the equipment of the well, primarily the casing and the tubing.

Lerch, of Ford, Bacon and Davis, was in charge of the depreciation of the Ohio Fuel gas wells, and Antonelli was his field representative.

A glance at the testimony of witnesses for the Columbus Company and the story of Lerch and Antonelli as to why they switched from their own well tried methods afforded abundant proof that the principle applied and the result presented by the appellant in the depreciation

of these accounts is the desire of Columbia System officials and not the independent judgment of unfettered appraisal engineers.

On cross-examination Antonelli testified that in depreciating the gas wells in the recent United Fuel Gas Company case in West Virginia, Ford, Bacon and Davis used the gas depletion method for gas well construction, (R., 1500), and that he had assisted in the inventory and appraisement of The East Ohio Gas Company and The Hope Company as of December 31, 1929, involving a natural gas rate for the City of Cleveland, Ohio, where the utilities are Standard Oil companies, and that Ford, Bacon and Davis engineers there also depreciated the gas wells by the depletion method. (R., 1499.) He further testified that he started to depreciate the Ohio Fuel gas wells by using the very same method that Ford, Bacon and Davis had used in the West Virginia case and were then continuing to use in the East Ohio case, (R., 1501, 1502), that he was getting the initial and final pressure for each active well when the appraisal engineers were "required" by the gas company to desist from the rock pressure decline method. He also said that they were asked by those for whom they were making the appraisal to make only a physical examination of the property. (R., 1497, 1500, 1501.) Concerning the difference in results from the use of the two methods he stated that depreciation on the depletion method in the East Ohio case amounted to about 50 per cent. while the average physical deterioration found under the so-called inspection method which Ford, Bacon and Davis were

here directed to employ produced a depreciation of only 20 per cent. in Accounts 211 and 212. (R., 1504.)

Lerch, who was the chief representative of Ford, Bacon and Davis, in making the Ohio Fuel appraisal, also testified that Antonelli had started to compile the records of the decline in rock pressure of all the existing wells but that he (Lerch) had agreed to the discontinuance of the method. (R., 1531, 1532.)

How far this work proceeded in depreciating Ohio Fuel gas wells is not clear. The City called for the working sheets and persistently tried to ascertain the point to which that work had proceeded. But all our efforts were resisted. The reason is an open book. Lerch said that the condition of gas well construction and equipment found in the United case was 50 per cent. or a little better. (R., 1533, 1534.) He admitted that he did not know how to explain the use by Ford, Bacon and Davis of two methods of depreciating gas wells at the same time. (R., 1535, 1536.) He further stated that the depletion method had been developed far enough in the Ohio Fuel case to show that they were going to get a lower valuation than was obtained in the method used. He was then asked this question:

> "Q. Well, I thought that among you representative gas utility men there was nothing more settled in your minds than the theory that you could, with all approximate fairness, determine the life of a well by the history of its rock pressure up to date?"

and his answer was:

> "A. I think you are perfectly right; I do not think anything has happened to change that." (R., 1538, 1539.)

Evidently the engineer, under orders from the Columbia System, had changed his method but had not changed his mind.

Lerch had testified at length in the United case, the record of which is included herein, and, upon cross-examination, was questioned as follows:

"Q. Mr. Lerch, when you were examined on May 7, 1929, in respect to the depreciation of gas wells, (in the United case in West Virginia) I am advised that these questions and answers were made and given. There may be some slight errors, due to transmission, but let me read them:

'Q. Now, in that way you got the value of the wells new. How did you ascertain what the present value of the wells was, the depreciated value? A. Well, we have been talking only about the one account, the gas well construction account. The cost of drilling wells we have assumed in this report the same as in the previous report and the same as we have done in practically all cases of valuing natural gas properties, that the gas well construction account was in the same deteriorated or depleted condition as the remaining rock pressure; in other words, we tabulated the rock pressure of the present wells and averaged the present rock pressure, and compared that with the original rock pressure of these identical wells, and found the wells had a remaining rock pressure of 46 per cent., and we have deducted therefore 54 per cent. of the new value as representing the amount of deterioration in the gas well construction account.'" (R., 1543, 1544.)

He commented that the quotation was substantially correct. (R., 1545.)

Whoever reads Lerch's testimony in the United case will find no occasion thereafter to question Blundon's

basic reasoning in respect to the depreciation of gas wells.

It was finally developed, upon cross-examination, that Weymouth, of The Columbia Engineering and Management Corporation, was the Columbia System official who claimed to have "finally convinced" Ford, Bacon and Davis to use the new method. He said he explained his principles of depreciation to them and that they were a little hard to win over but he convinced them. (R., 1630-1633.) And what are Weymouth's principles of depreciation? For his frank confession we need only read his testimony, (R., 1636), where he reveals that he believes property should go into a rate base at cost new without depreciation. He would hold property and equipment at 100 per cent. condition until it is absolutely abandoned. This is a golden dream of certain utility engineers which commissions and courts still reject.

Now whom shall we believe or follow? Philip drunk? Or Philip sober? Ford, Bacon and Davis using their best judgment in the United case, apparently unrestrained by orders from above, and Ford, Bacon and Davis in the East Ohio case, or Ford, Bacon and Davis starting in Ohio Fuel with their own old methods but, after sitting down across the table with Weymouth, the Columbia System spokesman, being "finally convinced" * * * "that the method used in West Virginia was wrong * * *"? Weymouth used the wrong word. He did not convince them. Antonelli says that he was "directed" to change the method: (R., 1500.)

The physical condition of the tubing and casing in the

wells was determined by observation. Of course the observation was not based upon an inspection of the material in the wells, for that was hidden, but upon an inspection of casing and tubing that had been taken from recently abandoned wells. When the average per cent. condition of the recently pulled tubing and casing from other wells had thus been determined, that per cent. was assigned as the condition of both the equipment and the existing wells and also to gas well construction, the hole in the ground. (R., 1497.)

We say in passing that there is no possible connection between the per cent. material condition of the equipment in the well and the worth of the mere hole in the ground. Surely, whatever method may be used for depreciating the gas well equipment, the hole in the ground loses all value the moment the gas well is abandoned through depletion or otherwise.

A gas well is drilled and equipped for the purpose of producing gas from the underlying sands and obviously is of little use or value when that purpose has been fulfilled or when that purpose has been terminated. The usefulness and the life of a well are measured by the proportion of gas which it has produced and by the proportion it will still produce. The hole in the ground is of no value or profit after it has ceased to produce gas in paying quantities. Indeed it then becomes a liability because of the statutory obligation to plug it.

Blundon applied this same rule of declining rock pressure to the depreciation of the gas well equipment, and as we have already indicated, the commissions of both

West Virginia and Ohio adopted and used Blundon's principles in depreciating both accounts. (R., 202, 203.)

The only possible excuse for applying observed depreciation to the gas well equipment, to the casing and tubes, is that there is a salvage value.

Surely the cost of withdrawing the casing and the tubes and the plugging of the gas well would largely eat up any possible second-hand value of the casing and tubes. So, it is not reasonable for us to insist that the gas well equipment should be depreciated in exactly the same way that gas well construction is depreciated, in proportion to the depletion of the gas as determined by the decline in rock pressure? (R., 1511, 1512.)

There are a number of interesting West Virginia cases, in some of which Ford, Bacon and Davis represented the utility. But it is sufficient to refer to one—**Re Clarksburg Light and Heat Co.**, decided in December, 1927, P. U. R. 1928B, 290, pp. 313, 314. Ford, Bacon and Davis had made a report on depreciation and, of course, had been represented in the testimony. We take this from the opinion of the Commission:

> "It is evident the engineers have not taken into account the cost of salvaging the equipment and the cost of complying with the West Virginia law requiring abandoned wells to be securely plugged. Moreover, it is impossible to disassociate the cost of labor and the cost of material in determining the value of a structure. Upon its abandonment the cost of labor is entirely lost, except for its salvage value less the cost of salvaging it. No further evidence of salvage value of gas well equipment was adduced, and, it appears that a consistent and fair treatment of this account warrants the application of a per-

centage of depreciation equal to that for gas well construction. And it is noted that on December 31, 1926, the average rock pressure had continued to decline until a per cent. condition of 34.6 was fixed in Lerch Exhibit No. 7."

Blundon, for the City, based his depreciation, both of the gas well equipment and of the gas well construction, upon the depletion of the gas well itself—upon the proportionate amount of gas that could still be reasonably expected to be withdrawn from the well as reflected by the decline in rock pressure. (City Ex. No. 74, p. 9, Original.) He thus arrived at a depreciation of 58.11 for the two accounts. (R., 1509-1511.) This is the depreciation used by the Commission and the Court.

In the United Fuel gas case in West Virginia where both Lerch and Blundon testified on the subject of gas well depreciation, Blundon's method of depreciating both gas well construction and gas well equipment on the basis of decline in rock pressure was adopted by the Public Service Commission. (R., 2958.)

We submit that the method presented by Blundon, adopted by the Commission and approved by the Court, is a proper one and that it would have been employed by Ford, Bacon and Davis as to Account 211 in this case had it not been dominated by orders from the Columbia System. The complaint of the Columbus Company in the matter is without merit.

6. Cost of Organization—The Ohio Fuel Gas Company.

Assigned Error 5 (f) alleges that the Court erred in making no allowance in the value of the property of Ohio Fuel for cost of organization. It is claimed by the Columbus Company that an amount of $1,999,922.00 should have been allowed.

Counsel for the Columbus Company are mistaken if they really believe that no amount for this item was included by the Commission and Court. Organization is a part of general overheads and as such it was recognized and allowed.

This charge of error is already answered in our discussion and argument of Overheads, supra. It will there be found that the minority Commissioner, under "Undistributed Construction Expenditures", otherwise known as General Overheads, included 1 per cent. for organization in considering Ohio Fuel and that the Supreme Court of Ohio held the finding of the minority to be reasonable and lawful. (R., 64.)

In the finding approved, organization expenses are discussed as follows:

> "I have eliminated any specific allowance for organization due to the fact that this element is in the allowance of 14% for undistributed construction expenditures." (R., 197.)

These allowances, as we have said before, are a matter of estimate and we submit that an ample inclusion has been made for this item of which the Columbus Company complains.

7. Incomplete Construction.—The Ohio Fuel Gas Company.

Under Assigned Error 5 (k) the appellant protests the failure to include the value of property of Ohio Fuel partially constructed but not yet placed in operation.

The amount claimed for this item was $234,295.00.

The property was not used and useful. The statute requires that property upon which rates are based be "actually used and useful." Ohio General Code, Section 614-46, Appendix,

8. Amortization and Depreciation Charge.—The Ohio Fuel Gas Company.

The Columbus Company protests the treatment of Ohio Fuel in the matter of amortization. Assigned Error 5 (d).

In Assigned Error 5 (1) it also complains of the allowance considered proper as an annual collection for depreciation reserve by Ohio Fuel.

Amortization.

No claim was made for amortization by the Columbus Company for its own properties. Its only contention in this matter is presented for Ohio Fuel and United. This annual amortization allowance must not be confused with the annual depreciation allowance which was included by the Commission and approved by the Court; it is demanded as a separate and distinct allowance.

Amortization as requested in this case may be defined as the payment over a period of years by consumers to a corporation of an amount equal to the present purported reproduction and/or market value of all its properties, both tangible and intangible, in addition to the payment of all operating expenses, including repairs and replacements of property, the building up of a depreciation reserve and the rendering of an annual return.

Demands of this nature from public utility companies must be closely scrutinized; they are often made for the express purpose of rendering commission regulation impotent. Through these preposterous additions to operating expense some companies seek to obtain unjust and unfair rates while calmly maintaining that governmental agencies can do nothing but place upon them the stamp of approval.

There is little place for amortization in utility regulation because it has been found to readily lend itself to all kinds of abuses. It should never be allowed except where property can be given a definite life beyond which it will serve no useful purpose. Confiscation can be claimed only if the end of the business and the destruction of the Company's investment are predictable by reliable testimony. Where this cannot be done a gas business has no more right to lay claim to amortization allowance as a matter of constitutional guarantee than the telephone business or the electric light business. Unless the termination of a business can be predicted with reasonable certainty there is no constitutional support

for an assault upon a statute denying the right to amortization in that business. The vice of permitting amortization of property that has indefinite life and usefulness and of basing an annual charge upon fancied and inflated values is fully apparent in this case.

The Claims for Ohio Fuel.

In order to acquaint the Court with the extent of the demands of the Company we must refer to a few of the items included to which amortization would apply:

Engineering and superintendence	$3,049,442.00
Law Expenditures, Insurance, Taxes	1,199,953.00
Organization	1,999,922.00
Interest	4,619,426.00
Cost of Financing	3,199,876.00
Going Concern Value	12,000,000.00
Leaseholds	43,004,477.00
	$69,073,096.00

We point out these items specifically because standing alone they plainly demonstrate the indefensible character of the claims on this subject. But in addition the right is demanded to amortize all other properties at the Company's claimed cost of reproduction amounting to more than $70,000,000.00, which, of course, brings the purported total subject to amortization to the amount of $140,000,000.00. (R., 2912-2914.)

A general amortization was thus sought for all these

inflated values over a period of 25 years. The amount per year which would be collected for the purpose was $5,449,221.00 and at the same time claim was made for an annual depreciation allowance of $1,420,241.00 or a total annual collection for amortization and depreciation of $6,869,462.00. (R., 161.) Now, upon what evidence does this contention rest? Upon the following from the cross-examination of Company witness Seyffert:

> "Q. * * * You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir. * * *" (R., 1480.)
>
> "Commissioner Bricker: What else would you set up amortization on except leaseholds?
>
> The Witness: Set up amortization on the whole property, because when the gas is gone, the rest of the property will be of no value to the stockholders." Company Brief, pp. 44 and 45. (R., 1489.)

It may pertinently be remarked that this is a very flimsy pretext upon which to ask consumers to pay an annual amortization of $5,449,221.00. Nevertheless this constitutes the evidence upon which opposing counsel rely. There is nothing else. In fact, the testimony must be read in light of the cross-examination of Seyffert in order to understand just how baseless it really is. His testimony, as is shown by the following excerpt from the Record, is of no probative value and was rightly disregarded:

> "Q. Now you are going to write this whole investment off in 25 years? (No reply.)

Q. That is your purpose? A. 20 or 25 years; I do not know that we can make it absolutely definite.

Q. Why not 25 or 30? A. Well, in my judgment, that is too long.

Q. Well, you did select 25 and I ask, that is your best judgment? A. Well, I cannot say I just selected 25; I selected about that and used four percent.

Q. Well, 25 into 100, of course, does give four per cent. You say the present estimate of the probable life of the natural gas business based on extensive surveys, geological studies, well-pressure decline and analysis, etc., indicates a probable period of 25 years? A. Yes, sir.

Q. How do you make up your mind about that? Refer us to the literature which has aided you in reaching that conclusion? A. I am not referring to literature; I am referring to my experience in the business, together with the contact and experience of other people and the generally known hazards of the business and the character of the business, all of which is taken into consideration in arriving at what is a reasonable term over which we feel that we must get a return of the capital or of the value in order not to suffer a loss.

Q. I think you told me rather fairly one day that in no sense did you consider yourself an engineer; you consider yourself an accountant and auditor? A. No, I consider myself more than an accountant and auditor. I have been with the company in this business a good many years.

Q. Oh, I know you have. A. And I know something of the character of the business.

Q. Well, have you made a study of the life of natural gas? A. Well, in my connection with the company, the question of the life of wells and the question of the continuance of the business comes up frequently.

Q. But, Mr. Seyffert, a few years ago, five or six years ago, your company was saying that five or six

years was the probable life; what has brought about the change?

Mr. Turner: Which company?

Mr. Butler: The Columbus Gas & Fuel Company.

The Witness: Well, I do not know anything about such a statement, to begin with.

Q. You think it was wrong, if it was made by anybody? A. Well, I cannot say because I do not know that it was made.

Q. Well, I will relieve you of that obligation; I will put it differently. Could that have been properly said in 1925, that the probable life of the gas business was five or six years, natural gas business? A. Well, I don't think it could, no.

Q. We don't think so either, but I am interested in knowing how you get at 25 years? A. Well, you know and I know that no one knows exactly when it will be; we have got to make an estimate of that, and as I say here the probable theory is 25 years; it depends upon many things; it depends upon whether you will find additional fields; it depends on how much is taken out each year; and all those things have to be weighed and some estimate has to be made of the probable life which we have done, and we have estimated that as 25 years, which is as long as I think we should for those purposes.

Q. Have you a discussion of that somewhere where you have gone into it, where you have from an accountant's or an engineering point of view reached that conclusion? A. No, sir.

Q. Well, you think that is the best answer you can give me? A. I do, yes, sir.

Q. All right. What does the Company's balance sheet reveal as to the amount of the reserve for depreciation and amortization? A. I haven't those figures with me, Mr. Butler; I may have them.

Q. As of December 31st, 1929? A. I may have it here. In Exhibit 43, page 5, the depreciation is $19,006,536.66; the amortization $1,739,029.89.

Q. Then you have a surplus of how much? A.

We had a surplus December 31st, 1929, of $5,288,031.10.

Q. Not that reserve—and I have it in my notes as $20,726,000.00—. A. I think you have added the two together; I think that is about right.

Q. Oh, I see. Now that has gone into your property, hasn't it, that 20 million dollars plus; what have you done with that reserve? A. Yes, that has been reinvested in the property.

Q. Well, now, do you mean to say that you expect the Commission to allow you to amortize that $20,000,000.00 at the end of 25 years? A. I expect the Commission to allow us to amortize any amount of money that is put into the capital of our business.

Q. Well, in the next 25 years at the rate you calculated of about $1,420,000.00 a year, you would raise that to $35,000,000.00 or $40,000,000.00 more; would you expect that to be returned? A. Whatever money is put into plant absolutely we expect to be returned to us.

Q. You want this Commission now to allow you to bring back the whole of this $140,000,000.00 at the end of 25 years although you already have a reserve in excess of $20,000,000.00 and although under your set-up you will in the next 25 years get an additional reserve of $35,000,000.00 or $40,000,000.00? A. That is rather a long question but I think I can answer it—

Q. All right. A. By saying that the value of the property as found here is $140,000,000.00; we certainly are entitled to have that returned to us during the life of the property; by application of four per cent we will get it back in probably 25 years or thereabouts. Now if at the end of that time we get the $140,000,000.00 back, and reinvest it in property, we will certainly expect it back, because that money belongs to the stockholders and it is reinvested in different property and during the life of that property we certainly would expect it back again; or any

other money that is put into the plant; always we must get it back or we stand to suffer that loss."

* * * * * * * * * * * * *

"Q. What are you going to do with this $35,000,000.00 or $40,000,000.00 that you propose in the next 25 years to take for the purpose of depreciation—what you call depreciation and amortization as distinguished from your big amortization; what are you going to do with that; and whose money is that? A. It is the stockholders' money.

Q. The stockholders' money? A. Yes, that belongs to the stockholders. When the company earns some money at agreed rates or rates adjusted by the Commission and creates an amount above operating expenses, that belongs to the stockholders. The reserve is set-up for the benefit of the stockholders so that he will get his money returned to him.

Q. But you are going to return it to him under your general amortization plan? A. I don't get your question.

Q. All right. By the way, how long has this company been in operation? Give me the historical set-up of this company in as few words as you can. A. Well, of course, it has been growing all the time; it has been growing all the time; it starts out in a small way and the earnings and the depreciation reserves have been reinvested in the plant until it has grown from — I think The Ohio Fuel Supply Company started in 1902; some of the other units may have been a little older. I think The Columbus Gas & Fuel Company was a little older than that; probably not as a natural gas company; but from that beginning they have grown up to what they are today." (R., 1480, 1481, 1482, 1483, 1484.)

Ohio Fuel and its predecessors have been in existence for approximately 30 years during which time they have continually bemoaned the impending exhaustion of the

supply of natural gas while meters clicked steadily. But it remained for the Columbus Company to come into this rate case at a time, when natural gas is admittedly known to be the most plentiful in its entire history, and ask the Commission to consider amortization for Ohio Fuel of all properties at a claimed present value of $140,000,000.00 over the period of the next 25 years in order that it (the Columbus Company) may charge to its operating expenses a high rate for purchased gas.

One wonders why during all those 30 years, when the "wolf" was supposed to be coming at any minute, some of this amortization which is now fancied necessary did not take place. The fact that these companies have already had a long life, during which time they have collected high rates and paid large dividends while amassing big reserve funds, appears of no importance to the Company.

Again we quote from the cross examination of Seyffert:

> "Q. Well, now, by what process of reasoning do you take those combinations of properties and fix them at $140,000,000.00 and then amortize off the whole of it in the next 25 years? A. I have told you before that I did not fix the $140,000,000. However, that was fixed through a valuation which is expressed here. Now if we are to go forward with this plant and if we are right in our estimate of the life of 25 years, then we must amortize it at that rate in order to get the value of the plant back in that period of time.
>
> Q. Well, shouldn't you have been amortizing back there; shouldn't somebody have been amortizing? A. Not necessarily, no, sir." (R., 1484, 1485.)

Such is the indefensible basis upon which the Columbus Company seeks to support an unfair charge by a sister corporation.

Indeed, the Harvard professor, brought to the witness stand as an outstanding expert by the Columbus Company, said that amortization is a matter of negligible imporance and should not be considered in connection with the settlement of our rate. Here is his testimony:

> "Q. What per cent would you think it safe to put aside for the time the gas would be depleted to pay you back your capital? A. I should refuse Your Honor to even guess at that, the wildest sort of guess. I should assume in the buying of a natural gas property today in our eastern field, I should assume that that was a possibility which did not have to be taken into account. The advanced technique, the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary, in the eastern territory—all these were factors which made such an assumption unnecessary.
>
> Q. So if you would assume that somebody in this case had testified that it would be the part of good business to put aside a reserve of four per cent each year to get the capital back at the end of 25 years, you would not agree that that was necessary? A. No, sir, I would not agree." (R., 2599.)

Of course opposing counsel ignores this evidence and attacks the opinion of the Supreme Court of Ohio. But they cannot conceal the weakness of their contentions by such a ruse.

Under no theory is there any right to a general amortization of the properties of any of these companies. The Record in this case shows conclusively that there is no

shortage of natural gas. That is a bogy with which consumers were once frightened into paying higher rates, but no longer. The City took great pains to destroy the old cry, "The wolf is coming". The exhibits and testimony clearly justify the view that the Court should waste no time in considering the lack of supply or any cessation of the supply. Dewing, as we have shown under Rate of Return, said that great trunk lines are being tied up with each other in both eastern and western fields so that instead of drawing from particular fields we are now drawing from great reservoirs of natural gas and that exhaustion of supply for any particular locality is growing less and less each year. He said that in a city like Columbus failure of supply is a factor that need not be noticed. (R., 2598, 2599.) Another witness for the Company, Wheeler, said that a few years ago consumers were being urged to use less gas but are now being induced to use more gas because the reserves are known to be much larger than was then thought. (R., 2664.)

We have shown the vast extensions of pipe lines and the vast aggregations of capital that have gone into them. Great pipe lines have gone into the east, to Baltimore, Washington and Philadelphia, from West Virginia and Kentucky. Great pipe lines have been laid across the prairies to Chicago, and the Columbia System has put millions into a pipe line that taps the great reservoirs in the southwest. (R., 1478, 3104B, 3089, 3090.)

The evidence discloses nothing to prove that the ex-

perience of the Columbia System even suggsted remote fears of failure of supply. This testimony is submitted:

"Chairman Geiger: All right. Well, now, if the Columbia Gas & Electric Corporation, which is the parent company of these subsidiary companies, had any fear that there was to be a near failure of the gas supply in the various gas fields, why have they expended large sums of money, which they necessarily must do, to construct these distribution lines into these large cities?

The Witness: I have not heard any one say that the Columbia fears that the supply would exhaust.

Mr. Turner: Mr. Seyffert has correctly answered that there has been no such testimony and no statements made except Mr. Butler's questions.

Chairman Geiger: You then would say that there is no imminence of failure of the gas supply at this time?

The Witness: I know the management of the Columbia well enough to know that they are not spending money unless they can feel that they can get their money back and an earning from it. They are good enough business men to do that, and they certainly have looked into the question of the supply of gas before they would build a line of that type.

Chairman Geiger: All right, then, that answers the question; there is no fear now in the minds of The Columbia Gas and Electric Corporation that there will be a near exhaustion of the present supply of gas?

The Witness: None that I have ever heard expressed.

Chairman Geiger: All right." (R., 1479.)

The Record further shows that there are millions of acres of untouched gas lands in Ohio and West Virginia.

We again invite attention to the testimony of witnesses for the Company discussed under Unoperated Leaseholds showing their estimates of gas reserves in Ohio.

There is no reason for assuming in the instant case, without proof, that the usefulness of the property now devoted to natural gas service by Ohio Fuel and United is even limited to the life of the natural gas supply. In fact the testimony of Dr. Dewing reveals what he calls "the possibility of the use of producer gas in connection with natural gas, and the ultimate substitution of producer gas for natural gas, if necessary in the eastern territory." (R., 2599.) This, it may be assumed, is due to the extensive deposits of coal located in eastern territory, including Ohio and West Virginia, from which artificial gas may be produced.

Commissioner Bricker, in the minority opinion, stated the situation as follows:

> "Ten years ago in Ohio a similar investigation as this would have brought promptly to issue the question of the supply of gas, the company contending then as did other companies that the supply was rapidly running out and that there must be consideration given to the amortization of property and unobserved depreciation allowances, based upon a maximum gas supply of ten years. The company's witnesses in this case state that for all practical purposes the supply of natural gas available for this market is unlimited.
>
> The Commission therefore can approach this problem without giving consideration to the life of the property other than as to those factors resulting from normal depreciation and obsolescence." (R., 192.)

The majority opinion thus tersely stated their conclusions:

> "However, gas seems now to be such an assured product that for the purposes of the present consideration it may be regarded almost as reliable as a water supply." (R., 170.)

The Commission and Court were fully justified in assuming an unpredictable life for the usefulness of these properties.

On this subject the Supreme Court of Ohio said:

> "There is no provision for amortization under the laws of Ohio. Where the life of a utility's product is uncertain, can it be intelligently and fairly amortized? We think not.
>
> The contention that there should be an allowance by way of amortization sufficient to return the entire investment of the company to the stockholders during the period of the life of the business is untenable as the business has no fixed life.
>
> As bearing on the question of the certainty of the life of the business, the gas company places much stress on the testimony of practical gas men, to the effect that they could not predict a longer life than twenty-five years for the company. Practical experience teaches us that this is a mere prophecy. The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guess-work. * * * That the product natural gas will eventually die is self-evident. When it will die is an assumption. An assumption is no stronger than the facts that support

it, and it is just as fair to assume that much of the equipment now used in the transportation and distribution of natural gas will be utilized for the transportation and distribution of artificial gas in the future."

The Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, supra. (R., 66, 67.)

While it is true that amortization has never received legislative recognition in Ohio, if what is claimed as amortization constitutes some form of depreciation it may be included in the operating expenses under the Ohio statutes as construed by the decision of the Court in this case. The Court said:

"Unless amortization can be converted into some sort of depreciation there is no authority in law for such a charge in this state.

It may be insisted that unless a reasonable amount is allowed annually for amortization a fair rate basis cannot be attained. That may be true, but the Legislature has prescribed a valuation formula. If this formula is unfair to the utility, unless and until it reaches the point of confiscation, the remedy is with the Legislature and not with the courts." (R., 69.)

It is perhaps unnecessary for us to state that the construction placed on the statutes of the State by its highest Court is accepted by this Court.

Thornton v. Duffy, 254 U. S. 361, 368, 65 L. Ed. 304, 41 Sup. Ct. 137;
Douglas v. Noble, 261 U. S. 165, 168, 67 L. Ed. 590, 43 Sup. Ct. 303;
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 154, 41 L. Ed. 369, 17 Sup. Ct. 56.

But even if the Ohio statutes sanctioned amortization where the life of the gas business could be established with certainty, the evidence in this case would not sustain it and the allowance claimed could not be adopted.

Since the evidence in the case at bar establishes a life expectancy for the business of Ohio Fuel extending into the indefinite future, there is no basis in fact for any claim for amortization. The demand for amortization of all properties was thus properly refused by the Commission and the Court.

The Palpable Errors.

The action and errors of the majority Commissioners in this matter, which led to reversal by the Court, should be pointed out. In their finding they provided for an annual depreciation charge and also an annual amortization charge for certain properties. Under the title, "Amortization," this statement is found:

> "In addition to the physical depreciation of property we have also the difficult question of an amount proper to allow for depletion of the gas-bearing lands. When a well is drilled which produces gas it requires expensive equipment, including casing and other apparatus incident to its effective operation. Each well must be attached to a gathering line, often of considerable length, through which the gas passes to the transmission line.
>
> The average life of gas-bearing lands in Ohio is seven and one-half years, and as gas ceases to flow from any well in paying quantities, the land, the well, its equipment become almost valueless. The hole in the ground of course is a total loss as is the

acreage it was designed to drain. The casing can be pulled for use at other points but the expense incident thereto makes it of little value. It may well be that the compressing stations and transmission lines will become useless as a field is exhausted, although we are of the opinion that transmission lines will be useful for many years beyond the period in which any particular gas producing land becomes valueless through depletion.

While there is no statutory provision covering the item of depletion, yet it is apparent that it should be treated substantially in the same manner as depreciation defined by the statute, and we may designate it rather inaccurately 'amortization'." (R., 157, 158.)

They then proceed to fix an annual charge for depreciation reserve which is as follows:

"The Ohio Fuel Company under its set-up claims an annual depreciation allowance of $1,420,241.00 and for amortization an annual allowance of $5,449,221.00, a total annual charge of $6,869,462.00. The question of depreciation as presented by each side to this controversy will be found in Company's brief, page 69, et seq., and in City's brief, page 342, et seq. As against the claims of each party the concurring commissioners, with the assistance of the Commission's engineers, have arrived at the conclusion that 1½% of the present value of the depreciable property, being all of the physical property with the exception of lands and rights of way, would correctly represent the average amount that should be set aside for depreciation reserve. This amount produces $667,612.00." (R., 161.)

And amortization is provided for in this language:

"As to amortization we have considered the evidence disclosing that the average life of an Ohio well

is seven and one-half years. The depreciation estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

Considering the present condition of these wells the remaining life expectancy is an average of three years and two months. We have considered that accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy we find that the annual amortization should be $4,158,954.00. The two items of depreciation and amortization amount annually to $4,826,566.00." (R., 161.)

With the foregoing findings and figures in mind, but always remembering that the Ohio Court is not to be understood as accepting or approving the method of the majority in dealing with amortization, we shall now discuss the evident mistake therein.

The Court will observe that this finding places the average life of an Ohio well at 7½ years and then assumes that the average life of the wells used in the appraisal in this case will also be 7½ years. It also declares existing wells to be 58.1126 per cent. depreciated, leaving the present value of gas well construction, gas well equipment and leaseholds 41.8874 per cent. of the original value. The age of existing wells is thus found to be 4 years and 4 months and the life expectancy 3 years and 2 months and the present value of gas well construction, gas well equipment and leaseholds amount-

ing to $13,065,581.00 is declared amortizable over this said period of 3 years and 2 months in the annual sum of $4,158,954.00.

This finding is based on the average life of wells that had been abandoned by Ohio Fuel and the former Logan Gas Company. It is not taken from evidence establishing the average age of existing wells or their years of expectancy.

On re-cross examination, (R., 1488), counsel for the City asked Seyffert, witness for the Company, this question:

"Anything else, Mr. Seyffert?"

and Seyffert answered:

"Yes, sir, you asked me for the average life of the abandoned wells of the Ohio Fuel Gas Company and I find that life to be 7½ years."

The abandoned wells of Ohio Fuel referred to were wells that had gone out of existence prior to December 31, 1929, the date certain of this cause. Those wells are not used and useful property to be considered here. We are concerned with the life, as of the date certain, of the present existing wells out of which consumers are being furnished gas and their probable future life. The Commission was legally bound to consider carefully wells in this case that were properly used and useful.

The statutes of Ohio provide for the valuation and consideration of only "actually used and useful property." Section 614-46, G. C., Appendix, establishes this definite limitation. And aside from this firmly established principle, what is there to justify the majority of

the Commission in turning to other wells that existed in other places, under different conditions—including those in other pools or pockets that quickly expired after being drilled in—to determine the life of these certain wells, if their average age as of the date certain is known and their life expectancy from that time forward can be reasonably predicted?

The life of the combined wells of Ohio Fuel and the Logan Gas Company, which Ohio Fuel took over in June, 1929, in use at the time of this case, is a figure quite different from the 7½ years that the majority Commission adopted. At pages 1487, 1488, of the Record, Seyffert was asked, upon cross-examination:

> "Q. Let me right there ask you whether you do have the average age of those Logan wells and of those Ohio Fuel Gas wells or of the combined wells? A. I have the average age of the combined wells, 8.9 years. There were just a few that we could not get the actual age on. Instead of the 3565 wells as shown by the exhibit, the average age of 3491 is 8.9 years.
>
> Q. Yes. That is negligible. What were your oldest wells? A. There is one 1895.
>
> Mr. Turner: And it has not given out?
>
> Commissioner Geiger: Still flowing?
>
> The Witness: Still making some gas.
>
> Q. And then run down roughly how the ages went. A. One in 1899; five in 1900; five in 1901; 11 in 1902; 15 in 1903; 21 in 1904; 29 in 1905; 33 in 1906; 37 in 1907; 42 in 1908. Do you want them all?
>
> Mr. Turner: Go ahead.
>
> The Witness: 57 in 1909; 65 in 1910; 73 in 1911; 72 in 1912; 85 in 1913; 89 in 1914; 128 in 1915; 144 in 1916; 239 in 1917; 220 in 1918; 136 in 1919; 165 in 1920; 201 in 1921; 179 in 1922; 216 in 1923; 163 in

1924; 159 in 1925; 231 in 1926; 222 in 1927; 272 in 1928; and 175 in half the year 1929. We got this out June 30.

Q. (By Commissioner Geiger): Now, those are flowing wells at this time? A. You say flowing? They are probably all being pumped. They are all producing some gas, yes, sir."

Now, in light of this testimony, what is the life expectancy of these existing used and useful wells? The majority Commission in fixing the depreciation, found that they were 58.1126 per cent. depleted, leaving the present value 41.8874 per cent of the original value, using the declining rock pressure method of determination. It therefore follows since, as Seyffert says, the wells are 8.9 years of age, they possess a life expectancy from December 31, 1929 of 6.4 years which gives them a total life of 15.3 years.

In addition to the testimony of the witness for the Company, which of itself is conclusive, we have the testimony of Blundon for the City. He testified to almost the same facts but used all of the wells and hence arrived at slightly different figure. His testimony is as follows:

"Commissioner Bricker: Based upon Ford, Bacon & Davis' study of the present condition of those wells, what would be the life, the average life, of a gas well in Ohio, approximately, if you have it?

The Witness: I can give you that, I think, sir; it will take just a second. 43¾ years.

Commissioner Bricker: And what would be the average life under your set-up?

The Witness: Between 15 and 16 years." (R., 1491.)

We pause briefly to call attention to the above testimony that the study of the present condition of existing wells put in evidence by Ford, Bacon & Davis, appraisal engineers for Ohio Fuel, would give them an average life of 43¾ years. These engineers assigned a depreciation to the wells, using the observation method, instead of decline in rock pressure, at the command of officials of Ohio Fuel and the Columbia System, although as independent appraisers, they had employed, and were employing, the decline in rock pressure method. The majority and minority Commissioners, however, agree that the depreciation of wells must be fixed by decline in rock pressure as shown by the history of the wells themselves and that it cannot be fixed by mere external observation.

A study of the average age in years of 3662 Ohio Fuel wells in existence measured by decline in rock pressure was made by Blundon and is set forth in City Ex. No. 74 on page 9, Original. It shows that the average age of these wells was 8.75 years, that they were then depreciated 58.1126 per cent. and were 41.8874 per cent. good. This would indicate a life expectancy of about 6.4 years and produce a total life of between 15 and 16 years.

Thus the combined testimony of Seyffert for the Company and Blundon for the City proves that the average age of used and useful wells as of the date certain was somewhere near 8.75 years or 8.9 years, which makes the finding of the majority of the Commission an absurdity, because it ascribed a total life of only 7½ years to these wells **and if this were true, they would all have been dead**

or abandoned approximately 1.4 years before the beginning of this case, December 31, 1929, an utterly ridiculous finding under the circumstances and the facts.

The majority of the Commission, using 7½ years as the average life of the wells, assigned to them a remaining life expectancy of only 3 years and 2 months and further found that the amortization of gas well construction, gas well equipment and leaseholds should be spread over that period and that the annual charge for the purpose should be $4,158,954.00. Accepting the majority finding as correct in all other respects for the moment, although it is not, giving effect to the proper life expectancy alone reduces the annual allowance for amortization under the Commission's method by some $2,100,000.00. That amount was included as an annual charge through error and had to be eliminated.

The correction of this mistake alone reduces the total annual charge for amortization from $4,158,954.00 to some $2,058,954.00 and the total annual charge for both depreciation and amortization from $4,826,566.00 to some $2,726,566.00 and will result in a reduction of the gate-rate that Ohio Fuel may charge the Columbus Company by approximately 4 cents per M c. f. This resulting decrease is figured by using 53,579,575 M. c. f. sales.

The Court will note that we have not been showing the weight of the evidence. We have been showing a clear mistake—a blunder—of the majority. The basic facts stand out in the Record without contradiction.

In passing judgment on this phase of the Commission's finding the Supreme Court said:

> "The commission holds that life expectancy of the gas company's producing wells is three years and two months, and on this basis there should be an annual amortization of $4,158,954. With this finding of the commission this court cannot agree."
>
> **Cols. Gas & Fuel Co. v. Public Utilities Commission of Ohio**, supra, P. U. R. 1933D, 254. (R., 72.)

In light of this language we are unable to comprehend the statement of opposing counsel on page 119 of appellant's brief. They there say:

> "The court below approved the gas well depreciation based upon the three years and two months of probable life of the No. 1 leaseholds." (Company Brief, page 119.)

We are sure such information will be a surprise to the Supreme Court of Ohio, as it is to us.

The finding of the Commission was clearly in error. The Court had no alternative, under the facts and the evidence, but to declare it unreasonable and unlawful.

Other apparent errors were committed by the majority in considering this matter but it seems necessary to do no more than mention some of them here. For example, even if amortization as determined by the majority were proper it should not have required consumers to continue to pay a return to the Company upon the property they will have retired through these annual payments. Under the ruling $4,158,954.00 would be paid out the first year to the Company and yet it would continue to

collect a 6½ per cent. return on this same $4,158,954.00 for the next 2 years and 3 months. Surely—even where amortization is proper—some plan would have to be adopted to prevent this wrong and credit consumers with interest on their money paid.

Neither legally nor morally is there any right to collect amortization unless credit is given in some manner for the moneys paid in. The principle is so just and so firmly established that it is universally accepted. Some commissions and courts, where amortization was found necessary, have set aside the moneys paid in as a sinking-fund drawing interest to the credit of the consumer and arrived at an annual charge by determining what amount assessed annually drawing interest will return the necessary sum over the period accepted for retirement of the investment. Certainly some adjustment would be required but the majority Commission gave it no consideration.

We have already noted the arbitrary leasehold valuation employed by the Commission in the amount of $7,284,900.00. This represents 291,396 acres of leases for which the Company invested a total of less than ¼ the value assigned, and yet the majority decreed that the entire arbitrary value should be paid to the Company through an annual amortization charge spread over an erroneous estimate of the life of existing wells. We have shown that the probable life of existing wells is much longer than the Commission assumed and in addition we state most emphatically that the evidence plainly shows that the life of existing wells and the life of Class

1 leasehold will not expire at one and the same time. (R., 1098, 1164, et seq.) The Commission's conclusion is belied by the testimony of witnesses Dally, Wittmer, Meals and Webber. (R., 3039, 3138, 3248.) Thus to charge the value of all leaseholds out over the life of existing wells would require amortization of acreage that will still remain used and useful and would be placing an undue and unusual burden upon the rate-payer.

Nor was investment value of the property presented to the Commission by the Columbus Company or given any consideration by the Commission. The cases are clear that amortization, even if it were allowable, must be based upon the investment and not upon the present appraised value.

United Fuel Gas Company v. Railroad Commission, 13 Fed. (2d) 510 (1925) (District Court, E. D. Kentucky) (Hickenlooper, J.);

Re Cumberland and Allegheny Gas Company, P. U. R. 1928B, 20, 80 (West Virginia Commission);

Clarksburg Light and Heat Company v. Public Service Commission, P. U. R. 1920A, 639, 650, 100 S. E. 551 (1919) (West Virginia Supreme Court of Appeals);

See **Whitten-Willcox, Valuation of Public Service Corporations**, Section 857, page 1862.

It is respectfully submitted that the appellant has not only failed to sustain the burden of proof resting upon it but that there is no constitutional right to an amortization allowance where the time of termination of a business cannot be predicted with reasonable certainty; that the evidence in the instant case establishes the probable

life expectancy for the business of Ohio Fuel extending into the unpredictable future which is repugnant to any claim for general amortization; that even if the life expectancy of the gas business were established with certainty, the Record does not support either the contention of the Columbus Company or the findings of the majority Commission, and that the decision by the Supreme Court of Ohio that the amount included by the majority was unreasonable and unlawful is not prejudicial to the appellant regardless of statutory interpretation.

Annual Depreciation Charge.

In presenting the position of the City in the matter of depreciation charge it is proper to say that the statutes of Ohio, the experience of the company and the existing depreciation reserve have been given consideration. These elements have been ignored by the Company.

Under the heading, Annual Depreciation Charge and Depreciation Reserve, in discussing the Columbus Company we have pointed out that the laws of Ohio, G. C. 614-49, 614-50, require public utilities to set aside and account for a depreciation reserve fund.

The accumulated reserve of Ohio Fuel as of December 31, 1929, and December 31, 1930, was $20,745,566.55 and $21,011,147.43 respectively, without addition of accumulated interest. A witness for the Company testified that of this reserve $1,739,029.89 on December 31, 1929, and $2,037,861.51 on December 31, 1930, was designated by the Company as set aside for amortization of leaseholds.

(R., 2902, 3034.) He also reported a surplus of $5,288,031.10 as of December 31, 1929. (R., 2902.)

In the beginning of this discussion we stated the annual depreciation and amortization allowance claimed for Ohio Fuel. If these and similar claims are to be recognized no rate is too high for a gas company to support, regulation becomes mere mockery and the measure of the price of gas becomes what the traffic will bear.

The majority Commission, in arriving at its erroneous figure for amortization, evidently gave no thought or effect to existing reserve funds.

The minority Commission says plainly that he did take them into consideration in arriving at a proper annual allowance to Ohio Fuel:

> "I have, in computing an allowance for depreciation and amortization, used 2½% of the value of the property, excluding land, working captial and material and supplies, which reduces the amount claimed by the company in the sum of $5,103,855.00. A complete study has been made of the depreciation charges of the company which show for the year 1929, an unexpended depreciation reserve in the sum equal to 22.20% of the book value of the company's property.
>
> "It is my opinion, therefore, that an allowance of 2½% on the value of the property of The Ohio Fuel Gas Company is a reasonable allowance for depreciation in view of the fact that there has been allowed completely the company's figures for maintenance, including nonproductive well drilling expense.
>
> "These amounts are sufficient, when taken together, to maintain the property in a high standard of efficiency and to provide a reserve to take care of

the property as it wears out and to ultimately provide for the complete replacement of the property.

The amount of depreciation, herein allowed, applicable to the portion of its property considered in this case is substantially the same amount in dollars, as shown by the books of the company for its entire properties including its distribution system." (R., 205.)

The annual allowance thus determined is $1,765,607.00 and embraces all depreciation including depletion.

The percentage of 3.6, of which counsel for the Columbus Company would make much, Company Brief 84, was employed by Blundon without any consideration or thought of the existing depreciation reserve or experience of the Company. It is evident that the minority Commissioner and Court held a proper consideration of these elements highly important.

Smith et al. v. Illinois Bell Telephone Company, 282 U. S. 133, 158, Supra.

The figures submitted by appellant for Ohio Fuel in Company Ex. No. 177, (R., 2999), show that for the years 1928, 1929 and 1930 Ohio Fuel used its depreciation reserve for replacements, retirements, et cetera, at the average rate of 1.79 per cent. per year. This was for all its properties, including distribution which should not be considered here, as is pointed out in the foregoing quotation from the minority opinion.

In consideration of the accumulated reserves, the low accrued depreciation assigned by the Commission and approved by the Court,—it being that placed thereon by

the Company itself except as to gas wells—the experience of Ohio Fuel as shown for the whole company without apportionment to production and transmission, it is apparent that the finding of the minority Commissioner is sound in this matter.

The action of the Court below reversing the majority as to amortization was imperative. The Court, however, placed no limitation upon the annual allowance for such depreciation as is required by the evidence.

9. Allocation.—The Ohio Fuel Gas Company.

The Columbus Company protests the allocation of transmission property and expenses of Ohio Fuel on a demand-mileage basis while the production property and general property of the same company are allocated on a sales basis. This is Assigned Error 5 (n).

We have already explained the compelling facts that forced the Commission to refuse to accept the Columbus Company's argument that it should be permitted to charge, as a part of its operating costs, a contract rate with Ohio Fuel of 45 cents per M. c. f. as a gate-rate.

The Commission found that there was no "arm's length" contract between a free and willing seller and a free and willing purchaser because of the Columbia System's complete domination, and that, therefore, it was necessary for the Commission to inquire into a fair charge to the Columbus Company. (R., 2147, 145, 192.)

Immediately upon this ruling of the Commission the question thrust itself into the open whether there should be a state-wide gate-rate, that is, the same gate-rate for

each community in the state served directly or indirectly by the Ohio Fuel or such a gate-rate for Columbus or for any other community as its demand and load factor and its distance from the supply should dictate.

Very early in the hearing before the Commission when the City demanded allocation in respect to Columbus counsel for the Columbus Company assumed a belligerent attitude and said:

> "Mr. Turner: We might as well meet that now. It will not be followed by any allocations.
>
> The Ohio Fuel Gas Company has no property dedicated to the service in Columbus. The Ohio Fuel Gas Company figures are brought in here by reason of it being a related company. If it were not a related company the contract between the two companies would be final and there would be no question to go back of. That was settled in The West Ohio Gas Company case here." (R., 1777, 1778.)
>
> "Mr. Turner: All right. But we do not intend to allocate and if counsel want to save time in the matter we are willing to go into that matter now; we do not intend to allocate and claim we have no right to allocate, and that there is nothing to allocate; that this matter is a matter of fair dealing between two companies, whether or not The Ohio Fuel Gas Company is selling to The Columbus Gas & Fuel Company at a fair price; I do not see how you could allocate; I could not begin to think of a way to allocate, if I admitted that it was proper." (R., 1779.)

Since these declarations were made as soon as the City had clearly indicated that it would insist upon allocation, it is apparent that a decision had already been reached by the Columbus Company that it would neither make nor assist in making an allocation.

Soon after counsel for the Columbus Company had made these positive statements the City moved the Commission, among other things:

> "To require The Columbus Gas and Fuel Company to make proper allocation of the property of the Ohio Fuel Gas Company used and useful in rendering the service to the City of Columbus and likewise such an allocation of the expenses and operating charges." (R., 2145.)

The Commission, after careful deliberation, sustained the motion of the City, pointing out that in doing so it had taken into consideration Article 18, Sections 3, 4, 5 and 6 of the Ohio Constitution, which makes the municipality in Ohio the unit to be considered in all utility matters. It also referred to the statues of Ohio as recognizing the municipality to be the unit whereby and wherein rates and services shall be determined. (R., 2145, 2147.)

The ruling of the Commission was right both in morals and in law. Ohio is a firm adherent of the privilege of home-rule, and the reasonableness of a gate-rate to a given city must be measured according to the facts relating to service to that city and not according to the facts relating to gas delivery to almost the whole State of Ohio and to a part of Indiana.

But the Company did not allocate. True, it changed its "will not" to "cannot", but it could not alter the facts. It chose to take a defiant stand and, in refusing even to assist in allocation, it must bear the consequences in failing to sustain the burden of proof which it must carry.

Then, perceiving the weakness of the claim that it could not allocate, the Columbus Company began to claim an allocation by the volume method which it said was the only method that would produce fair rates between the different localities. Now everyone well knows that the determination of a rate upon merely a sales or volume basis, ignoring distance and load factor, is no allocation at all, for of course, it simply results in fixing a state-wide or system rate. It was an insult to the intelligence of the members of the Commission for counsel to pretend that they had complied with the orders of the Commission in that respect. Furthermore, the Company not only defied the ruling as to allocation but also became a heckler and an obstructionist.

The City claimed the right to whatever advantages Columbus enjoys, not only in respect to distance, mileage, but also in respect to load factor. The volume or sales method basis give no recognition to these elements. The testimony of Blundon, witness for the City, that distance and load factor should be given effect in the determination of the proper gate charge to a given city is supported by the admission of witnesses for the Columbus Company upon cross-examination. For example, Winans, who is by declaration and admission the Columbit System's skilled rate man, testified that load factor should not be lost sight of in fixing a proper gate-rate for Columbus. (R., 2094, 2095.) And we further find this in his cross-examination:

"Q. When you fix the same gate rate for each community in this state, in what way have you taken

care of these individual load factors and the merits of the high load factor and the demerits of the low load factor? A. We haven't. That is one of the things that we want to do. It is my own recommendation that the straight line meter rate of the city gate should be changed to one having a load factor. In that way the city having the higher load factor might get a little lower rate." (R., 2096.)

An outstanding official of United, Hightower, was called as a witness by the Columbus Company and he testified at considerable length. We quote the following from his cross-examination:

"Q. Well, I would be glad to read what Judge Rits said; when I follow him I think I have progressed pretty well. Here is what Judge Ritz said, on page 1633 of his testimony—or his statement rather; not of his testimony, but of the testimony; 'Now, the other proposition, I know what Your Honor is getting at. That is the transmission lines. When it came down to the transmission lines, that would not have been fair to the West Virginia cities, so they devised the way in our former rate case to allocate that. For instance, the gas that is coming to Ohio comes farther than the gas that is delivered to Charleston. Charleston is right at the gas field, the largest one in the Appalachian Region. So they considered the element of mileage, the mileage that the gas was transported when they came to allocate the value of the pipe line'.

Now what does that mean to you? Is that what you have in mind? A. Yes, that is all right. That just only applies to the transmission system. That is the reason I asked you to be more specific; they considered—we considered the miles the gas was transported and the amount transported and made the allocation.

Q. Well, suppose you have two cities; the whole

pipe line is 200 miles; one of the cities is 100 miles away and the other is 200 miles away; they each use the same amount of gas; now what sort of a factor do you work out there for appraisement? A. By way of illustration, Mr. Butler, we took the miles times the M c. f. transported and weighted the result. Now is that clear to you?

Q. My pride forbids me saying no. Take my illustration, where each city uses the same amount of gas on the same pipe line, one is 100 miles and the other 200 miles; what results then? A. I have to know the amount transported for each place.

Q. The same amount for each; that is what I said. A. Well, that would be one-third to one and two-thirds to the other.

Q. That is the method in respect to transmission that has been adopted in West Virginia? A. Yes, sir.

Q. And that is the method that you used? A. Yes, sir." (R., 1818, 1819.)

It was thus clearly established that the Columbia System had elsewhere applied substantially the same methods of allocation as were here contended for and presented by the City.

Company Exhibit No. 23.

The Columbus Company, before it knew what it was doing because the City had not then demanded allocation, put into the Record the facts, the undisputed facts, which not only make allocation necessary but which also make it practical to apply.

We now invite the Court to examine Company's Exhibit No. 23, (R., 3057-3058B), which was introduced through Company witness Phillips. He was in charge

of the pressure department of the transmission lines. (R., 1784.)

The very heart of this Company Exhibit No. 23, (R., 3058B), is a map showing the Ohio Fuel System and the supplies and deliveries on two peak days, that is, on two cold days, one of them very cold and coming at the end of a cold period of some length and of very considerable intensity. One of these days was January 13, 1929, almost a year before the date certain. The other was January 23, 1930, practically co-incident with the date certain.

On the lower left hand corner of the map is this:

"Note:
*Totals indicate deliveries on January 23, 1930.
Mean temperature + 3° (max. + 10° min.—11°)
Wind velocity 7 miles.
Gross sales 309,000 M cu. ft."

On the lower right hand corner of the map is this:

The Ohio Fuel Co.
Diagram
Showing
Sta., pipe lines, dir. of flow and volume comp. of
Gas produced January 13, 1929.
Mean temperature on this date + 4°.

A glance will show that Wheeler Station, the great receiving, compressing and distributing station, is some 35 miles southeast of Columbus. Into Wheeler was brought all the gas received from West Virginia on those two days and all the gas produced or purchased locally in Ohio in the district located south of a line running southeast from Columbus, north of Wheeler, and south of Crooksville, to the Ohio River, of course, after all of the local demands in that district had been met.

This map further shows how these totals, brought into the Wheeler Station on these respective dates, were distributed, indicating the amounts that were sent over the various pipe lines to the various cities and communities. These amounts check with great precision and they tell a story which is beyond all dispute.

Since this Exhibit 23 and Phillips' testimony in connection therewith became so important that the Columbus Company spent many weary hours in trying to explain them away, it is well to note the attitude of the Columbus Company and likewise the conditions under which the exhibit was brought into the Record.

Let us see whether Company Ex. No. 23 (R., 3057-3058B), and Phillips were in good faith. His original testimony will be found on pages 1770-1774 of the Record. Months before he testified the City had been furnished with this Company Ex. No. 23 and with Phillips' questions and answers. Consequently, it cannot be said that the exhibit and the testimony were offered hurriedly or without due preparation. On the contrary, they had been carefully thought out and prepared.

Note these questions and answers from Phillips' testimony, on direct examination:

"Q. Are you familiar with the pipe lines which discharge gas into and which carry gas out of Wheeler Station? A. Yes, sir.

Q. Are you familiar with the amounts of gas which come into Wheeler Station from various sources and the markets to which the same go after leaving Wheeler Station? A. Yes, sir.

Q. Have you prepared an exhibit showing the location of this Wheeler Compressing Station, the pipe

lines entering and discharging from the same and the amounts of gas received from various sources and delivered to various markets from that station? A. I have. The exhibit consists of two maps taken from our engineering department records as to all pipe lines delivering gas to Wheeler Station and all pipe lines leaving Wheeler Station for markets. It also contains a statement of the gas received at Wheeler Station, and gas sales in the various markets as extracted from our gas analysis earnings.

Q. I hand you what has been marked as Company Phillips Exhibit No. 23 and ask you to state if that is such exhibit? A. Yes, sir." (R., 1771.)

One observes how carefully Phillips explained the lines and whether they were receiving or discharging lines. Indeed, he was very careful to explain that, as an exception, Line H between Wheeler Compressing Station and Zanesville did not always operate in the same direction, that when the local eastern supply at times of extra heavy demand could not furnish the market requirements, it was necessary to discharge gas into the line from Wheeler for Zanesville, instead of using for Wheeler the gas from Zanesville. (R., 772.) This is only unusual operating condition he found it necessary to explain.

It will be noted that on the map Phillips had not only graphically portrayed the lines but also, for two peak days, in different years, one in 1929 and the other in 1930, had given all of the figures and all of the directions—had given them so clearly that there could be no mistake about what the map meant.

A disinterested person, upon reading his testimony

and examining this part of the exhibit, would conclude that Phillips knew what he was talking about and was trying to put before the Commission in a graphical form the truth in respect to the amount of gas received by Wheeler Station and the amount of gas discharged therefrom, as well as the exact sources and destinations thereof.

Later, on cross-examination, he was asked a few pertinent questions:

> "Q. Mr. Phillips, do you bring down from the north any gas to Wheeler or Sugar Grove or Grimes? A. Gas is distributed or marketed by the shortest haul, and we would not have occasion to bring gas from the northern part of the State to the southern part of the State.
>
> Q. So you never do that? A. No, sir; unless something out of the ordinary required it, something of that nature.
>
> Q. Do you bring any from Mt. Vernon down to Wheeler or Sugar Grove? A. We have on days that we have had our eighteen inch line shut off between Linden and Treat compressing stations; there is a small amount of gas from Homer Station to Columbus. The sixteen inch line between Wheeler compressing station and Treat is a floating line that gas can be dispatched from either direction." (R., 1775, 1776.)

The Columbus Company had not then wholly sensed the fact that "this map was not made for allocation purposes". It was necessary for them to use many pages of testimony in an attempt to set Phillips right after allocation had appeared on the horizon.

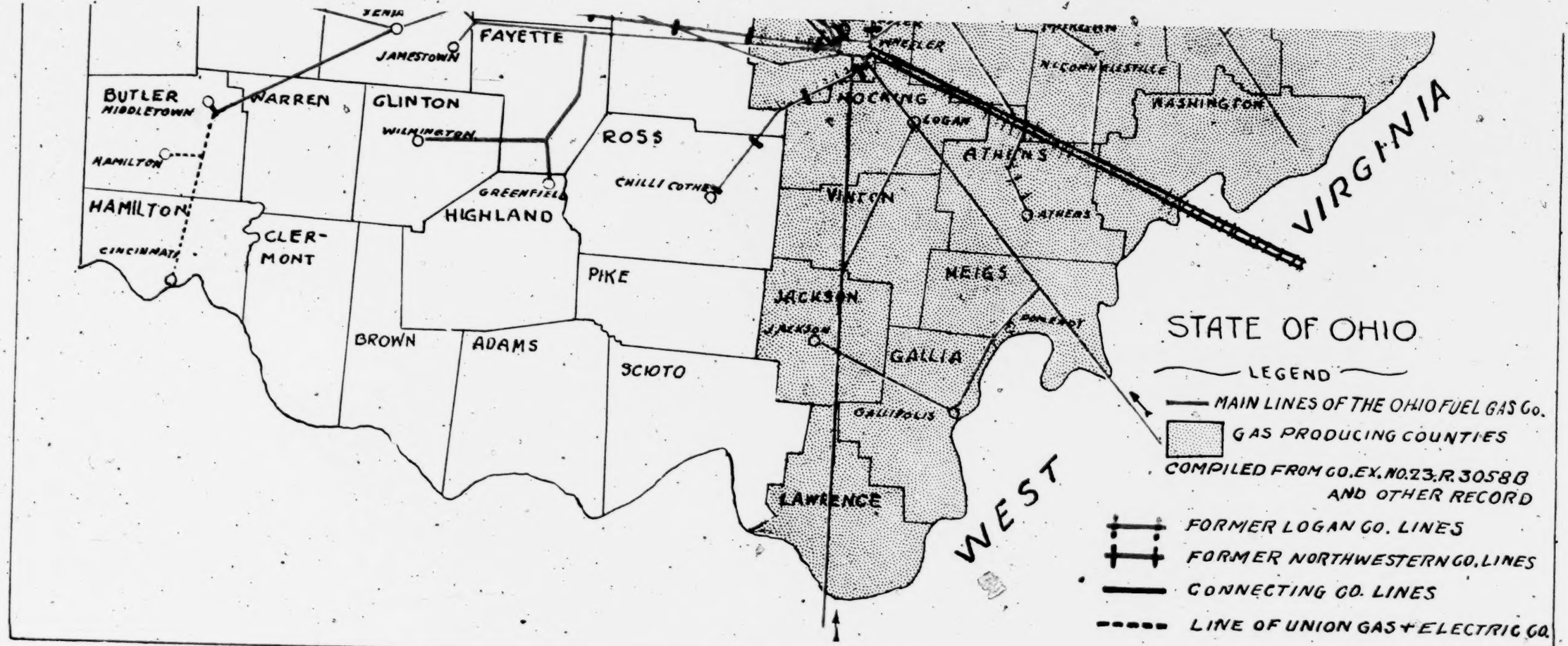
As the days went on, as he continued to testify, as the

question of allocation was forced home upon him, and the Columbus Company, Phillips more and more found it impossible to put a finger on the direction of the flow—indeed the gas was flowing every hour of every day in every way, and the great pipe lines stretching out to Indiana and to Toledo and to Cincinnati were really great storage pressure tanks for the benefit of the City of Columbus, forgetting that his own Exhibit 23, R. 3057-3058B, showed that on two extreme peak days Wheeler supplied all necessary gas without using any transmission line for storage purposes, and that great quantities of gas passed Columbus for markets further north and west.

It would seem that if one should even casually examine the map in Company's Exhibit 23 some kind of allocation in respect to Columbus would follow as a matter of course.

LAKE ERIE

WILLIAMS
FULTON
LUCAS
TOLEDO
WOOD
OTTAWA
HENRY
DEFIANCE
BOWLING GREEN
SANDUSKY
ERIE
SANDUSKY
FREMONT
LORAIN
CLEVELAND
CUYAHOGA
LAKE
GEAUGA
ASTABULA
TRUMBULL
PAULDING
PUTNAM
SENECA
HURON
NORWALK
SUMMIT
PORTAGE
HANCOCK
FOSTORIA
TIFFIN
FINDLAY
BERWICK
MEDINA
YORK
MAHONING
VAN WERT
ALLEN
WYANDOT
CAREY
CRAWFORD
ASH-
LAND
WAYNE
ASHLAND
STARK
ALLIANCE
COLUMBIANA
HARDIN
BUCYRUS
MERCER
AUGLAIZE
MARION
MARION
MORROW
MT GILEAD
HOLMES
TUSCAR-
AWAS
CARROLL
KNOX
SHELBY
LOGAN
UNION
CARDINGTON
JEFF-
ERSON
DARKE
SIDNEY
DELAWARE
MT. VERNON
COSHOCTON
HARRISON
SCIO
NEW CONCORD
CHAMPAIGN
MIAMI
PIQUA
URBANA
LICKING
GUERNSEY
BELMONT
ST CLAIRSVILLE
MADISON
FRANKLIN
MUSKINGUM
TROY
CLARK
SPRINGFIELD
CAMBRIDGE
ZANESVILLE
PREBLE
MONT-
GOMERY
FAIRFIELD
PERRY
NOBLE
MONROE
DAYTON
XENIA
PICKAWAY
MORGAN
FAYETTE
TO MUNCIE
INDIANA


XENIA
FAYETTE
JAMESTOWN
BUTLER
MIDDLETOWN
WARREN
CLINTON
WILMINGTON
HAMILTON
GREENFIELD
ROSS
CHILLICOTHE
HAMILTON
CINCINNATI
CLER-
MONT
HIGHLAND
PIKE
BROWN
ADAMS
SCIOTO
WHEELER
HOCKING
LOGAN
ATHENS
ATHENS
VINTON
MEIGS
JACKSON
JACKSON
GALLIA
GALLIPOLIS
LAWRENCE
WASHINGTON
VIRGINIA
WEST
STATE OF OHIO
LEGEND
MAIN LINES OF THE OHIO FUEL GAS Co.
GAS PRODUCING COUNTIES
COMPILED FROM CO. EX. NO. 23, R. 3058 B
AND OTHER RECORD
FORMER LOGAN CO. LINES
FORMER NORTHWESTERN CO. LINES
CONNECTING CO. LINES
LINE OF UNION GAS + ELECTRIC CO.

See the two great transmission lines running away from Wheeler, south of Columbus, one of them even into Indiana. Then look at the double transmission line running from Wheeler to Toledo as well as the line north to Mt. Vernon. It would require not only a total disregard of physical facts but also a most lively imagination to believe that the gas rate in Columbus should share any part of the cost or maintenance or depreciation of either of these lines. Then, too, look at the great mass of transmission lines north and northeast of Columbus which contribute nothing to Columbus and to the expense of which the Columbus rate should contribute nothing. (R., 3058B.)

The map of Ohio Fuel production sources shows that Columbus is in a much better situation than many other cities and communities in respect to natural gas. (R., 3190B.) Its rate should reflect those advantages, for we are assuming that the fine ambition of the majority of the Commission to give the same gas gate-rate to each section of Ohio, to equalize all differences, and thus to prevent one community from having a cheaper gas fuel than any other will receive no more encouragement from this Court than it received from the Supreme Court of Ohio. It is contrary not only to law but also to common sense. It would be just as wise for the Commission to decree that for the whole of Ohio and Indiana there must be a common coal rate, or a common brick rate, or a common clay rate, or a common electric rate, or a common water rate, or indeed a common shipping rate. It is the duty of commissions to apply the law. If such great economic

changes are to be fashioned, and if all geographic differences are to be eliminated, let the Legislature act and thereafter let the courts determine whether such foolish legislation be constitutional.

There is a fact in connection with the transmission line running into Indiana that should not be overlooked. That line was a part of the old Logan Gas Company, which had been a Columbia System subsidiary for a long time but was not acquired by Ohio Fuel until June, 1929, R., 896, some six months prior to the date certain in this case. The Logan Company had been notoriously short of gas and its purchase by Ohio Fuel solved its difficulties.

Prior to its sale to Ohio Fuel the Logan furnished gas to about 100,000 customers, about 90 per cent. of whom were north and northeast of Columbus. It also sold large quantities to other companies and distributors, about 90 per cent. of whom were beyond Columbus, that is west, north and northeast of Columbus. The old Logan property had never been used for service to Columbus. Why should it now be considered when it was taken over 6 months before the date certain, admittedly short of gas, largely serving communities and companies west and north and northeast of Columbus? (Map, R., 3060-3061.)

The same thing is true of the double transmission line running from Wheeler Station to Toledo, which belonged to the Northwestern Company, likewise a Columbia System subsidiary. It was likewise not taken over until 6 months before the date certain and if the date certain of this case had been earlier no one would have ever

asserted that it could be of the slightest benefit to Columbus. (R., 923.) It was taken over at a cost of some $5,000,000.00, no part of which should burden Columbus.

Again take the map or diagram of Exhibit 23 and, having located Columbus, again draw an imaginary line running southeast from Columbus, passing north of Wheeler Station and south of Crooksville, to the Ohio River. In the district south of this line all the West Virginia gas is received and in that territory Ohio Fuel also has its south gas field where large quantities of Ohio gas are produced and purchased.

As we have said, this district produces a large quantity of Ohio gas which, after the local needs are satisfied, is carried into Wheeler. Indeed this local Ohio gas is put into the three great lines that carry the West Virginia gas. Counsel for the Company, in their brief attempt to prove that Columbus is not favorably located in respect to sources of supply. The presentation is confusing. The wells located north of Columbus are shown as 1833 and the producing area north of Columbus is shown as 135,824 acres; and then an unnecessary division is employed in showing the wells and acreage south of Columbus; they are split up and presented in three different groups and no total is given for them at all. The total of these wells is 1732 and the producing area 155,572 acres and the fact that approximately 1/3 of all the gas distributed by Ohio Fuel comes from West Virginia through southeastern Ohio, and must pass within a few miles of Columbus in going to western and northwestern markets, is not even mentioned. Company Brief, pp. 191-194.

Columbus is not benefited by a system-wide rate and the figures and maps, including Company Ex. No. 23, all speak in direct opposition to the claim of the Company.

Again we justify our claim that Columbus is well situated in respect to a gas supply by letting the Court look at Company Ex. No. 23 and an Ohio map upon which is portrayed the gas fields and upon which the big transmission lines are laid down. No denunciation, no foolish claims can contradict what is so easily seen.

Let us see what Company Ex. No. 23 further reveals. We have observed that Phillips made up his figures for this map from the history of two peak-load days, January 23, 1930, and January 13, 1929; he showed for each day the amount of West Virginia gas brought into Ohio which was collected at Wheeler and also the respective amounts of Ohio gas purchased and produced in the south field and brought into Wheeler. The figures are simple and check with very great accuracy so that even the Columbus Company must find it impossible to dispute the accuracy of their own figures. We have carefully checked and rechecked them for each of the two days and find that Phillips has accurately accounted for the sources of the amounts of gas that were sent out from Wheeler on each of those two days.

One of the important things in gas distribution is the peak-load and peak-days for they test the capacity of the system. This is why the Columbus Company, through Phillips, showed these peak-days in January, 1929, and in January, 1930. They reasoned and argued that if they could show what was done on those days of extreme

demand they would thereby explain and map the very heart of the problem.

Now on January 23, 1930, which is almost the date certain, whose highest temperature was 10 degrees above zero and whose lowest temperature was 11 degrees below zero, there was collected into Wheeler from West Virginia and from this South Ohio field, and sent out from Wheeler, 176,890 M c. f. And where did it go?

The figures check perfectly:

South to Chillicothe	2,250 M c. f.
West to Cincinnati, Springfield, Dayton and Piqua	16,500 M c. f.
West as far as to Muncie, Indiana	56,140 M c. f.
Northeast to Zanesville	2,500 M c. f.
North to Homer, near Mt. Vernon	16,500 M c. f.
Northwest to Toledo	31,000 M c. f.
And north to Columbus, combining both transmission lines into Columbus	52,000 M c. f.
Total	176,890 M c. f.

And from what places on that day did Ohio Fuel secure this Wheeler gas? As we have already indicated, every M c. f. came from West Virginia and this South Ohio field. No part of it came from the west, north or northeast.

On that day Columbus received less than 30 per cent. of the total gas sent out from Wheeler 35 miles away, while most of the other 70 per cent. was carried great distances.

Now on this very cold day at the end of a very cold

period we have a complete chart. Look at the map, look at Wheeler, and then let the Columbia System tell why the Columbus rate should be charged with a part of the cost of the two great lines running west, feeding Cincinnati, Dayton, Piqua and a part of the state of Indiana, or with the cost of the great double transmission line running north to Toledo, or with the line running to Zanesville, or with the line running to Homer.

Here are the facts, prepared not by us but by the Columbus Company, proving beyond dispute that the gas passing through Wheeler Station not only afforded abundant gas for Columbus and Chillicothe but, on this particular day, had 122,640 M c. f. to send west and north and northeast.

And the figures on Exhibit 23 for January 13, 1929, tell a like story. The gas from the south field and the West Virginia gas, when combined in Wheeler, 148,000 M. c. f., were abundantly able to take care of Columbus. But on that cold day in January, 1929, with a mean temperature of only 4 degrees, 49,000 M c. f. went north from Wheeler to Columbus and south to Chillicothe, while 95,000 M c. f. went west and north and northeast.

Under these impelling facts the Supreme Court of Ohio naturally held that there must be an allocation of the transmission system and expenses and that Columbus, being favorably located, should not be burdened with a higher rate, than that to which it would otherwise be entitled, in order that distant places like eastern Indiana and Toledo might receive a lower rate.

Take some of the towns further south, near or nearer

the Ohio River, surrounded by local gas fields, and with West Virginia gas passing their very doors. Should they pay the same gate-rate as a city some 240 miles away? As the towns in the extreme western part of Ohio? As Muncie, Indiana? As Toledo? As Cincinnati? From a standpoint of transmission distance obviously they should not.

Company Exhibit 23-A, (R., 3059), consists in part of a compilation styled, "Ohio Fuel Gas Company Deliveries, Year 1929", which is subdivided into "Receipts", "Deliveries", and "Summary."

The "Receipts" show that during that year the gas coming into the Wheeler Station was 64 per cent. West Virginia gas and 36 per cent. Ohio gas, a total of 33,374,431 M c. f.

The "Deliveries" show 30,647,234 M c. f. wholesale and 5,555,773 M c. f. retail, a total of 36,203,007 M c. f. Since there is no explanation it may be assumed that these retail deliveries were in the south field. If so, they should not have been considered in this computation. It was claimed that additional Ohio gas, 5,962,000 M c. f. was used to supply these markets. But it is significant that original Exhibit 23, prepared with so much care stood for many, many months showing the retail sales as only 3,636,163 M c. f. and the additional Ohio gas as 1,686,405 M c. f. Later, when allocation became a storm center, Phillips filed his new compilation, Exhibit 23, (R., 3059), showing some 2,000,000 M c. f. more as retail sales. This was to show that in order completely to supply Columbus, Cincinnati, Dayton, Indiana and Toledo markets,

it was necessary to add to the Wheeler supply the alleged Ohio gas from other sources, and thus awarding to Columbus 54 2/10 per cent. of West Virginia gas and 45 8/10 per cent. of Ohio gas..

But why charge any of this alleged additional Ohio gas to Columbus? And especially since this Exhibit 23-A records that, out of Wheeler and beyond Columbus there went 6½ millions M c. f. to Dayton, almost 6 millions to Cincinnati, almost 5 millions to Toledo, more than 1½ millions to Springfield and more than 1½ millions to Central Indiana Gas Company in western Ohio and Indiana.

In the light of these figures, compiled and written into the Record by the Columbus Company, of course the Court held unreasonable and unlawful the finding of the Commission that insisted upon insuring to Indiana and Dayton and to Cincinnati and Toledo a gate-rate as low as that of Columbus, although the point of major compression where the gas is collected before it is started on its various journeys is only about 35 miles from Columbus.

The burden of proving the ordinance rate unconstitutional was upon the Columbus Company. In order to establish a proper charge for purchased gas to be included in its operating expenses, it was necessary to apply some form of allocation. That was clearly the duty of the appellant.

Did it assume that duty? It did not. It not only belligerently announced that it would have nothing to do with it but went to the greatest possible lengths, as the Record clearly shows, in an attempt to ridicule and to destroy what the City did.

Method of Allocation.

Although it may not have been necessary, since the burden of proof was upon the Columbus Company, the City presented to the Commission and the lower Court what we believe to be the necessary and proper allocation in respect to Columbus. We shall, as briefly as possible, describe the City's methods and computations.

In order to determine a fair and reasonable price for gas coming through a large natural gas system to a city gate it is necessary to know the approximate cost of production, compression and transmission. It is neither possible nor necessary, however, to segregate either property or expense directly to an individual community. The question to be answered is what portion of the wells, compressor stations, pipe lines and other equipment is devoted to each city or community? This requires consideration of the use which the various cities and communities make of the property of Ohio Fuel. The query facing the City in this case was how much use does Columbus make of the system? And what is the measure of that use?

In retreating as far as possible from allocation the Columbus Company says the proper measure of use made by a given town or community is the total annual sales, regardless of where or how made, whether gas is delivered on one day only in the year or whether it is uniformly taken throughout the year, whether it requires one mile of pipe or three hundred miles of pipe, whether a total annual sale of 365,000 cubic feet of gas furnished

uniformly throughout the year will require a 2 inch pipe or whether the same sale on account of being delivered in 90 days will require a 4 inch pipe.

The City says that in order to determine a proper gate-rate, it is necessary to consider the elements of use that each city or community makes of the property of Ohio Fuel; that is, the total annual sales to each collective user and the total miles the gas is transported; that it is necessary to consider the manner in which gas is delivered—that is whether the gas is taken for peak load purposes only or whether it is consumed uniformly, or with some uniformity, throughout the year.

Under the uniform classification of accounts prescribed by the Commission the accounts, "Production Property" and "Production Expenses" include that property and those expenses which are used and incurred by Ohio Fuel in the production of gas, consisting mainly of gas wells, field lines, leasehold expenses and cost of purchased gas.

The cost of producing gas by Ohio Fuel itself varies with each well and the cost of buying it varies according to each contract. We, therefore, for convenience and in observance of what seems to be the commonly accepted method, put all of the **production property and production expenses throughout the entire State in one pool and averaged it to all users, regardless of location, miles of service or other variance, and allotted this property and these expenses uniformly through the State on the basis of gas sales.** (R., 1869 et seq.)

Production property and production expense was thus allotted to the use of Columbus on the basis of sales, i.e.,

in the proportion that the yearly sales to the City bear to the total yearly sales. (R., 3169-3172, 1896.)

The investment in transmission property consists mainly of compressing station structures and their equipment and transmission lines with their rights of way. The transmission expense is the sum of the expenses required to take the gas to the various users. It is here that load factor and distance become important. (R., 1929.)

Let us consider two cities using the same quantity of gas and having the same load factor. Let us say that one requires twenty miles of pipe line while the other requires forty miles. Clearly, as a transmission proposition one will require more than twice the investment in pipe line and compressor power than the other requires. Twice as much gas will be used as fuel to pump to the one as to the other. Twice as much will be spent in the maintenance of pipe line for the one as for the other. The Columbus Company says that under these circumstances an equal amount of transmission property and of transmission expense should be borne by each city. The City says this is unfair to the city requiring only twenty miles of line and that this property and expense should be allocated on the basis of the use each is making of the property.

Let us now consider two cities located the same distances from the gas fields, one of which uses 12,000,000 M c. f. of gas annually, at the rate of 1,000,000 M c. f. per month, while the other also uses 12,000,000 M c. f. of gas annually but during the winter time in the max-

imum month uses 3,000,000 M c. f. Assuming the system to be correctly designed, the city using 3,000,000 M c. f. per month must possess a pipe line of three times the capacity of the line required by the city using only 1,000,000 M c. f. per month. The compressor station capacity for the same city must be three times that of the other. The operating expenses will also be in similar proportion. The Company says these cities should be charged equal rates. The City says the fact that the investment and operating expenses of the one would be practically three times that of the other must be recognized and that the favorable load factor of the one city must be given due consideration.

The transmission property and transmission expenses were allocated to the City in the ratio of the demand of Columbus to the total maximum demand, on maximum demand days, weighted by the distance the gas is transported from a last point of major compression, like Wheeler Station. (R., 1896 et seq., 3169-3172.)

In preparing this data January 13, 1929, and January 23, 1930, were used as the two days of maximum demand. These are the two days which, in Company Exhibit 23 and in his testimony, Phillips said were the days of maximum demand in these respective years. (R., 1882.) Blundon stated that these demands were checked with maps in the Company's possession showing the Company's estimate of maximum demand for each community. (R., 1937, 1938.)

Blundon allocated the **general property** in the same proportion that the allocated share of the production

and transmission property bore to the total production and transmission property. He allocated the **general expenses** on the basis of expense, i. e., the proportion that the allocated expenses of production, transmission and distribution expenses bore, to the production, transmission and distribution expenses as a whole. (R., 4377, 4378.)

Blundon testified that in determining the estimated maximum demand for small towns not having a daily meter he estimated the maximum day's use. In the case of a seven day meter he took the maximum day as 116 per cent. of the average day and for those towns with a meter reading period of longer than 8 days he estimated the maximum day as being 5 per cent. of the maximum month. He further stated that all of these estimates were checked against the Columbus Company's estimated maximum demand for each community and that the method of estimating the maximum day as 5 per cent. of the maximum month's consumption is the Columbus Company's method of making the estimate. He stated also that this checked with the experience of towns in both West Virginia and Ohio where he himself had checked available daily meter readings. (R., 1952-1958.)

Toledo uses the Ohio Fuel system mostly as a stand-by service. (R., 2100.) As might be expected from such a condition it possesses a very poor load factor, and being far from production, a rather high rate is justified. But Toledo receives considerable artificial gas and the present Ohio Fuel gate-rate does not represent the gate-rate that city would pay if it received its whole supply from

Ohio Fuel. It would be much lower. If it possessed as favorable a load factor as Columbus the Toledo gate-rate would thereby be lowered 20 cents. (R., 3174.)

Bay Village is on the very edge of a field of production and this should and does give it a fairly low rate. (R., 2099.)

Waterman, witness for the Company, under whom the figures in Company Ex. No. 196, Original, were computed, said that some unusual distortions in the rates of certain consumers were due to the use of incomplete yearly sales.

Blundon's own computations for some of the city gates, revealing the effect of distance and load factor on rates, are set forth herewith:

Summary of Representative City Gas Rates.

(Page 4, City Exhibit 115, R., 3174.)

City Gate	6%	6½%	7%
Springfield	$0.344888	.352828	.360768
Springfield (West End)	0.243054	.247170	.251281
Springfield (Selma)	0.357184	.365586	.373989
Composite for Springfield	0.315042	.321528	.328679
Muncie, Indiana	0.415270	.425856	.436441
Pomeroy	0.205813	.208522	.211231
Chillicothe	0.249465	.253815	.258170
Columbus	0.263526	.268399	.273271
Zanesville	0.238537	.242479	.246421
Bay Village	0.189110	.191163	.193292
Rowsburg	0.262618	.267180	.272027
Sandusky	0.310295	.316936	.323576
Toledo	0.637190	.656117	.675046
Toledo (with Columbus load factor)	0.437294	.448708	.460122

A very narrow interpretation of a city gate was attempted by the Columbus Company. It pointed to the differences in rates at various entrances to the same city resulting almost wholly from differences in load factor and only slightly from distances. Some variations will exist, but gate stations leading to a single city are all holes of a common city gate and the community should receive the benefit of the composite load factor common to all of them. The average of the Columbus stations is therefore used for the gate-rate of Columbus. The average of the Springfield entrances is likewise used for Springfield.

A uniform rate may apply with considerable equality to a city or community but there is a limit to the territory to which it can be applied with any degree of fairness. It will be wholly inequitable when extended to cover the area of large commonwealths with the bulk of the supply issuing from one corner of the territory. Allocation is a matter of doing equity and giving consumers the advantage or disadvantage of their location and demand. An allocation of a transmission system by demand-mileage is a proper and just method.

The summary of allocation to the City of Columbus, as determined by Blundon, is set forth at page 11, City Exhibit 115, R., 3179. On the basis of a 6½ per cent. return it will be observed that the fair gate-rate to Columbus determined is 26.8399 cents per M c. f.

The vital importance of allocation is vividly portrayed when applied to the Commission's own figures and evaluations of Ohio Fuel from which they derived a Columbus

gate-rate of 39 cents per M c. f. If they had applied allocation to their own set-up they would have derived a gate-rate of 33.83 cents.

If Commissioner Bricker had applied allocation to his Ohio Fuel findings and computations he would have found a Columbus gate-rate of between 26 cents and 27 cents.

The Supreme Court summed up the contention of the parties and the action of the Commission in the following manner:

> "The city contends that production property of the Ohio Fuel Gas Company should be allocated upon the basis of sales, but that the transmission property should be allocated to the particular market in this locality upon the basis of mileage multiplied by the peak demands of the particular municipality. the company contends, however, that there should be no particular allocation either of the production or transmission property, to any one market except upon the basis of sales or consumption of gas. The city contends that this theory, of allocation results in a state-wide gate rate, that is, the same gate rate for each community in the state served directly or indirectly by the Ohio Fuel Gas Company, and that the city of Columbus is entitled to such a gate rate as is required by its demands and load factor and its distance from the source of supply. Both the majority and the minority holding of the Public Utilities Commission were in favor of the company upon this point."
>
> **Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio**, supra. (R., 59.)

The Commission did not pretend to make an allocation. The findings frankly state that only a system-wide rate is employed.

The majority Commission observed that:

> "At first blush one might say that the City of Columbus was not concerned with any other property of The Ohio Fuel Company than that which directly served it, and that in computing the value of the property devoted to its service there must be computed all other producing and transmission lines within the State which cannot be directly linked with it." (R., 166.)

And they further declared that:

> "The evidence clearly established that the system operated by The Ohio Fuel Company is built upon the plan that gas wherever produced is subject to be distributed to any point in the State where it may be required. Gas from the northern part of the State may be consumed in the southern, and gas from West Virginia may be distributed to any of the numerous gateways in Ohio. So it is with gas purchased by the Company." (R., 166.)

No one denies that gas from the northern part of the state could possibly be sent to the southern part, but Phillips says "gas is marketed by the shortest haul" and unless something out of the ordinary occurs gas is distributed at the nearest point to its production. (R., 1775, 1776.)

The Columbus Company attempts to dispose of the mileage factor, first, by showing how impossible it is to compute it without the additional expenditure of a large sum of money, and, secondly, by belittling it. The claimed lack of knowledge of the source of the gas and the alleged necessity for further expenditures are all obviated through the allocation of transmission lines

from the last point of major compression and apportionment of all properties back of that as production on a volume basis.

Really, the answer to each objection is found in an inspection of the transmission systems. An examination of a map showing these long transmission lines impels even a layman to suggest that here is a factor which both morally and legally should be a distinctive advantage for the city favorably located.

There are naturally times of emergency when it is advantageous to Ohio Fuel as a company and to consumers to have certain lines used in a different way than that in which they are normally employed. The Company seized upon this as a salient reason why there can be no allocation but it is only a superficial argument. This emergency use balances up; it is neighborly assistance, and—where it occurs—largely reciprocal. Why should Columbus pay a premium for it? Besides does it not benefit the Company as much or more than anyone else? It is certainly to the pecuniary benefit of the Company to keep gas at the consumers' meters and that is why they do it. The claim that emergency use of gas lines should defeat allocation is as shallow as it is false.

The Commission went far afield and tried to settle future economies for the whole state. It argued that:

> "Economically, considered, we are of the opinion that a substantially similar gate rate price in each community would work to the welfare of our State rather than having one city which might enjoy a comparative low rate while some other city might bear a high rate. **This difference in gas rates between different cities might result in an unjust pref-**

erence to the manufacturer and to the home owner in one city over those in another." (R., 167.)

They further observe that:

"The cities of Ohio should be permitted to use the entire system at substantially the same gate rate." (R., 167.)

We have thus quoted from the Commission opinion because, in light of the evidence we have just presented and discussed, it shows that the Commission was wholly in error. There is no question of the weight of testimony. The Columbus Company, before the City demanded allocation, placed in evidence the undisputed facts which make allocation necessary and applicable.

On error proceedings the Supreme Court of Ohio found that the Commission had acted unreasonably and unlawfully. This decision was made after careful consideration of the requirements of the Ohio Constitution. The Court said:

"The court is impressed with the fact that in this state the unit established by the Constitution for dealing with public utility service is the municipality. Article XVIII, Sections 4 and 5. This circumstance was held to have great weight in Indiana, where the demand of various utilities that a common gate rate be fixed was denied upon the ground that in Indiana the city, and not the system, is the unit. **Wabash Valley Electric Co. v. Singleton** (D. C.), 1 F. Supp., 106; **Indiana General Service Co. v. McCardle** (D. C.), 1 F. Supp., 113. The **Wabash Valley Electric Co.** case was reviewed by the Supreme Court of the United States, **Wabash Valley Electric Co. v. Young**, 287 U. S. 488, 53 S. Ct. 234, 77 L. Ed. 348, and the opinion of the court was delivered upon

January 9, 1933. The question of allocation was considered in the case, Mr. Justice Sutherland delivering the opinion of the court." (R., 60.)

The principle question which arose in the Wabash Valley Electric case, supra, was whether the utility in framing a rate for Martinsville would be permitted to take in the whole territory, including the individual distribution plants in the various cities and towns. The commission and all the courts said that such procedure would be illegal unless the Indiana Legislature constitutionally changed the existing law. Allocation by demand-mileage was not asked and hence was not involved. We assume that Martinsville was not interested in an individual allocation of the transmission lines and obviously, since the Wabash Company was fighting for the widest possible territory to which it might apply a common rate, it did not raise the question. The principle, however, is clear. The municipality is entitled to its rights as an individual unit.

The Ohio Court, in further commenting upon the opinion of this Court in **Wabash Valley Electric Co. v. Young, supra**, said:

> "The court cites a decision of the Supreme Court of Wisconsin, **City of Eau Claire v. Wisconsin-Minnesota Light & Power Co.**, 178 Wis., 207, 220, 189 N. W. 476, which determined that the Wisconsin commission was required to treat the municipality as a unit and to base its rate upon the cost to the utility of serving the individual municipality rather than the average cost of serving many distinct and scattered municipalities. Mr. Justice Sutherland, summarizing the decision of the Wisconsin court,

points out that the Legislature must have regarded the municipality as the entity on the one hand and the utility as the entity on the other, for the purpose of esablishing just and reasonable rates and service, and then states: 'Since the Indiana act was patterned after the Wisconsin act with a like history and attended by similar circumstances, the court below felt warranted in following the decision of the Wisconsin court; and with that view we see no reason to disagree.'

"Every argument that can be made in Indiana and Wisconsin with reference to the legislative policy of regarding the municipality as the entity to deal with the utility for the purpose of establishing just and reasonable rates and service may be and is reiterated here under the far-reaching Home Rule provisions of the Ohio Constitution." (R., 61.)

With this policy established the Court held:

"In determining the rate-base for a natural gas company, production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned, between different localities served, on proportionate sales basis.

"In determining the rate-base for a natural gas company, transmission system, valuation, and expenses should be apportioned, between localities served, on the demand mileage basis.

"In determining the rate-base for a natural gas company, distribution cost should be apportioned, between localities served, on the basis of actual valuation of distributing plants and expenses incurred in the several localities."

Columbus Gas and Fuel Company v. Public Utilities Commission, supra. (R., 51.)

The rule of this Court as laid down in **Thornton v. Duffy**, 254 U. S. 361, 368, supra, is again invoked. In that case Mr. Justice McKenna, in his opinion, said:

> "We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the constitution of the State, as much a part of both as if expressed in them (Douglass v. County of Pike, 101 U. S. 677), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the State, or in any way violates the Constitution of the United States."

To the same effect are **Douglas v. Noble**, supra, and **Fallbrook Irrigation District v. Bradley**, supra.

We have seen from the testimony of Hightower, (R., 1818, 1819), that in the United case before the West Virginia Commission, the record of which became a part of the Record in this case, the United presented an allocation similar in method to the one used by the City in this case and applied it to transmission properties and expenses.

But the demand-mileage allocation method was not introduced into West Virginia for the first time in the present United case. The Ohio Supreme Court, in considering this subject, refers to the following cases:

> "The demand-mileage allocation method is not untried. It has been used in West Virginia. **In re United Fuel Gas Co.**, P. U. R. 1918C, 193; **In re West Virginia Central Gas Co.**, P. U. R. 1918C, 453; **In re United Fuel Gas Co.**, P. U. R. 1920C, 583; **In re Hope Natural Gas Co.**, P. U. R. 1921E, 418.
>
> "This method was used in **United Fuel Gas Co. v.**

Railroad Commission of Kentucky (D. C.) 13 F. (2d), 510, a case affirmed by the Supreme Court of the United States in 278 U. S. 300, 49 S. Ct. 150, 73 L. Ed. 390, upon another point.

"In the case in 13 F. (2d), Judge Hickenlooper said at page 522: 'It therefore now becomes necessary that the determined rate base and the operating expenses be apportioned to the localities with which we are particularly concerned. We are of the opinion that production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned on the proportionate sales basis, transmission, system valuation, and expenses upon the demand mileage basis, and distribution upon actual valuation of the distribution plants in the several municipalities and actual expenses there incurred." (R., 59, 60.)

In the case which the Court cites known as **Re United Fuel Gas Company**, P. U. R. 1918C, 193, supra, the Public Service Commission of West Virginia applied the method thus:

"The production investment of a natural gas company was apportioned between wholesale and retail business and between localities, on the basis of sales; **the transmission investment between wholesale and retail and localities, upon the basis of demand and sales weighted by distance**; the distribution investment direct, as shown by the books of the company, and the general investment between wholesale and retail business and between localities, on the basis of sales."

The essential fairness of the method decreed in this case has been fully established.

The Columbus Company, in its attempt to avoid allo-

cation of Ohio Fuel properties, complains that exactness is not possible. We admit that these matters are not capable of precise answers. There must be some approximation. This should occasion no surprise since there are many elements of rate cases, as well as taxation, in the same category. The Commission apparently was impressed with this contention but the law is not so exacting—only reasonable determinations are essential. In **Smith et al. v. Illinois Bell Telephone Company**, 282 U. S. 133, supra, this Court, in speaking of objections to certain methods of allocation in the telephone business, said:

> "This method was adopted as a matter of convenience, in view of the practical difficulty of dividing the property between the interstate and intrastate services. The appellants insist that this method is erroneous, and they point to the indisputable fact that the subscriber's station, and the other facilities of the Illinois Company which are used in connecting with the long distance toll board, are employed in the interstate transmission and reception of messages. **While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential,** (Rowland v. Boyle, 244 U. S. 106, 108, 61 L. Ed., 1022, 1023, P. U. R. 1917E, 685, 37 S. Ct. 577; Groesbeck v. Duluth, S. S. & A. R. Co., 250 U. S. 607, 614, 63 L. Ed. 1167, 1172, P. U. R. 1920A, 177, 40 S. Ct. 38) **it is quite another matter to ignore altogether the actual uses to which the property is put.** It is obvious that unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy. **We think that this subject requires further consideration, to the end that by some practical method the different**

uses of the property may be recognized and the return properly attributable to the intrastate service may be ascertained accordingly.'' (Boldface ours.)

A number of cases hold that deductions from the evidence and the calculations in utility and tax cases are of necessity more or less approximate.

Wabash Valley Electric Co. v. Young, supra;
Utah Power & L. Co. v. Pfost, 286 U. S. 165, 190, 76 L. Ed. 1038, 1051, 52 S. Ct. 548;
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 563-566, 75 L. Ed. 544, 548, 549, 51 S. Ct. 248.

If allocation be proper—and it has been so held by the lower Court—it has been the duty of the Columbus Company at all times to make and submit a reasonable allocation in respect to the Columbus wholesale charge. The burden is on that Company and the inherent difficulties are no defense. Certainly, under these circumstances, the petty criticisms offered by the Company concerning purported mistakes of the City in applying allocation can avail them nothing.

The Witness, Carter.

From the attitude of the appellant in this matter, as shown by the Record and their brief herein, it is only fair to state that the order to Carter to allocate, if any, was given with a **wink.**

The appearance and testimony of Carter are both very interesting. Carter was a witness **against** the Columbia

System when he appeared on behalf of the people, or the cities, in West Virginia in the United case, the record of which is a part of the Record of this case. While that case was pending, after he had inquired about further employment in that case and had been advised that it was assumed that he would be called for further work, he was "lifted" into this case to testify for the Columbia System.

It was a gross breach of professional ethics for him to accept this employment from the Columbia System while still under employment by the cities in West Virginia in the United case.

As we say, he knew he would probably be used further in the United case. He had specifically inquired about his further work and Blundon had already advised that, as he assumed, Carter would be personally called again in the further hearing of the case which had been remanded to the Public Service Commission by the Supreme Court of West Virginia. (R., 2040-2043.)

If Carter's conduct be four-square, then we have no proper appreciation of what professional expert ethics mean. We may say that this episode is an exemplification of a city's difficulty, not only in securing, but also in keeping experts. Some large companies have two methods of dealing with witnesses for the consumer, one is to hire them if possible, but if this cannot be done they then employ the other, and under it they deliberately set about to crush and destroy. With Carter the first method worked.

The witness came prepared to stand by the Company's

claims, whatever the mental hazard might be. His testimony is filled with "mights" and "mays" that carry no punch or conviction. The United record refutes many of his assertions. (R., 2047-2049.) The Record shows that Carter "stretched" the facts, lengthened the lines included in the West Virginia allocation in order to give color to the Columbus Company's claim that there is no basis for an Ohio Fuel allocation and to create the impression that there is an essential operating difference between the United and Ohio Fuel. (R., 1932, 1933.)

When Carter came to Columbus he talked with the Columbia System representatives. He got his information from them. He accepted their statements that the gas was going every way, every hour in every day, and that it was quite impossible for him to secure the basic facts necessary for an allocation. (R., 2019.)

Under a searching cross-examination he was compelled to admit that he knew little about the basic facts and that he had wholly and unreservedly accepted the statements of the Columbia System officials that data was not available. (R., 2015 et seq.)

He was questioned closely about Company's (Phillip's) Ex. No. 23, but he blandly replied that Phillips had explained to him that he must not rely upon the sources and amounts and flows and directions so clearly portrayed by that exhibit. (R., 2029-2033.)

No Ohio Fuel system could be imagined for him that would permit allocation. He was even asked to assume that all of the gas came from West Virginia but even then he was sure that there could be no allocation. The

only thing that staggered him was when he was asked whether, if the Ohio Fuel lines should be extended into Michigan, he would still charge Columbus with its share of that investment. Even then he would not give a frank answer but admitted that that was a very hard question. (R., 2025.)

In order to illustrate what Carter really thinks of the demand mileage method of allocation we need only offer this excerpt from the Record:

> "Q. All right; I stand corrected. Did you ever in any other case use the method that you used in the United in the pending case there before the Commission? A. No, I think not.
>
> Q. That is a demand mileage allocation, isn't it? A. That is, yes, sir.
>
> Q. And a very good example of the application of the principle, isn't it? A. Very good example did you say?
>
> Q. Yes. A. Yes, I think so.
>
> Q. And very properly applied in that case? A. For that particular purpose it was all right." (R., 2043.)

His whole attitude was that of the Columbus Company and of opposing counsel that allocation must be precise and that, as long as you could find some criticism of what Blundon had done there was no duty on the Company to present any constructive work.

Extent of Territory Covered by Ohio Fuel.

No uniform gate-rate was ever established anywhere for a territory as large as that covered by Ohio Fuel and with so many cities and communities dissimilarly situated with respect to the supply and transportation of gas. Clearly there can be no justice in compelling those towns and communities located within, or in proximity to gas production, to pay a higher rate than could otherwise be justified for them in order that the price may be lowered for consumers who are situated long distances from production sources.

The case of **Hardin-Wyandot Lighting Company v. Public Utilities Commission of Ohio**, 118 O. S. 592, is urged by the Company as an authority for denial of allocation and a reason why it should have been denied by the Court in this case, but, as the Court will readily recognize, the two cases are in no way comparable. The Hardin-Wyandot Lighting Company served such towns as Kenton, Upper Sandusky, Dunkirk and Kirby and the entire territory in which it operated was encompassed with a circle described by a 13 mile radius. How can such a case be compared to one in which almost the entire state of Ohio and a part of Indiana are involved?

In the instant case the lower Court, in conclusion, used this significant language:

> "Just why the city of Columbus should be charged for the pipe lines extending to Indiana, to Toledo, and to Cincinnati, we cannot understand. By the preponderance of the evidence, the transmission lines

> north and northeast of Columbus do not contribute to the Columbus gas supply, and the gas rate in Columbus should not share any part of the cost, maintenance or depreciation of these lines. The test is what portion of the wells, the compressor stations, and the pipe lines is devoted to each city or community, and the method of allocation adopted by the majority and the minority of the commission was erroneous. If the proper method of allocation had been adopted, the gate rate found would have been materially decreased." (R., 61.)

The Supreme Court of Ohio, therefore, held that under the Ohio Constitution and Ohio laws the unit of allocation is not the system but the locality; that the finding of the Commission requiring the use of a system-wide rate for Ohio Fuel in determining its proper charge for gas to the Columbus Company is unreasonable and unlawful and that under the evidence adduced in this case proper allocation is arrived at by the demand-mileage method.

The effect of the allocation method approved by the Ohio Court giving recognition to distance and use is fully apparent. Of course the Columbia System vigorously opposed it because Columbus must be given a system-wide charge and also compelled to pay a tremendous tribute in the name of amortization—even under the inordinate claims for Ohio Fuel in this case—if the appellant were even going to come close to proving the ordinance rate unlawful.

10. The Cost to Ohio Fuel of Gas Purchased.—Independent Producers, The United Fuel Gas Company.

The average price paid by Ohio Fuel to independent gas producers in Ohio at the wells in 1929 was 15.57 cents per M c. f. (R., 913.)

The duty of proving the cost of transportation of purchased gas rested upon the appellant but it did not assume that burden. It is interesting to observe that W. G. Von Gemmingen, Consulting Engineer of New York, a well known gas authority, discussing this subject in Engineering News-Record, February 5, 1931, asks the pertinent question and answers it as follows:

> "How much does it cost to transport natural gas? Exclusive of the price paid for gas by the pipe-line company, the approximate total cost of transmitting gas 1,000 miles through a 24 in. pipe line is about 19¢ per thousand cu. ft. This figure includes interest, depreciation, operating expenses and local taxes, and contemplates annual sales of gas equal to about 55 per cent of the annual total capacity of the pipe line. The cost for other size pipe lines ranges from 2¢ to 2.5¢ per 100 miles." (Natural Gas—Its Accomplishments and Future, p. 235.)

For the year ending June 30, 1930 the amount of gas purchased by Ohio Fuel from non-affiliated or independent producers was 14,209,343 M c. f. The average rate per M c. f. paid was 15.01 cents, (R., 2900), with Preston Oil Company eliminated. We should here call attention to the fact that the Company in its Exhibit No. 43, (R., 2899, 2900), in order to show an average of 17.82

cents per M c. f. paid to independent producers, included as a non-affiliate The Preston Oil Company, to which it paid 35 cents per M c. f.; it is a part of the Columbia System. This inclusion served to raise the average rate paid to 17.82 cents.

For the same period the amount of gas purchased from affiliated companies, that is, other Columbia System companies, was 18,441,819 M c. f. The average rate paid per M c. f. was 28.28 cents. (R., 890, 2900.)

There was a wide variance between the price paid to independent gas producers and that which was paid to other Columbia System subsidiaries. It is apparent that sister companies were favored.

But Ohio Fuel's claimed cost of production per M c. f. was far greater than the price paid to even affiliated companies. As a matter of fact, the purported cost was so great that, even after gas purchased from independent producers and affiliated companies had been averaged in, Ohio Fuel witnesses contended before the Commission for a wholesale rate of 61.61 cents. (R., 2907, 698.) In spite of this, it will be remembered that Ohio Fuel magnanimously agreed to sell gas to the Columbus Company and throughout its system at 45 cents per M c. f. And it will also be recalled that the Commission and Court have both found that a fair charge to the Columbus Company is considerably less than either of these figures.

In order to determine a proper charge to the Columbus Company for the gas which it purchases from Ohio

Fuel the Commission inquired into the cost to Ohio Fuel, one of the elements of which is the cost of gas purchased by it from the United.

The Columbus Company says that the allowance to Ohio Fuel for gas purchased is insufficient to enable Ohio Fuel to pay for gas purchased from United and contends for the contract price.

It further complains of the failure of the Ohio Commission to allow a return on leaseholds in West Virginia consisting of all classes of acreage with a claimed value of $55,000,000.00.

We should here explain that the United rate which the Court found not unreasonable was determined by the minority Commissioner who employed the value of leaseholds as finally fixed by the West Virginia Public Service Commission. It is the valuation upon which existing rates in West Virginia are based.

The only authority possessed or claimed by the Commission was to make an investigation in order to determine whether affiliated companies were claiming undue profits at the expense of one another and what constitutes a fair charge to the Columbus Company of the cost of purchased gas.

We consider the principles announced by this Court in **Western Distributing Company v. Public Service Commission**, 285 U. S. 119, pp. 124, 125, 126, supra, as controlling in this case:

> "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the

court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction.

"The principles applicable in a rate investigation, where similar corporate relationship existed, were recently announced in Smith v. Illinois Bell Teleph. Co., 282 U. S. 133, 152, 153, 75 L. ed. 255, 265, 266, 51 S. Ct. 65, and no purpose would be served by repetition or elaboration of what was there said. * * *

"An averment of negotiation and effort to procure a reduction in the wholesale rate means little in the light of the fact that the negotiators are both acting in the same interest, — that of the holding company which controls both."

The burden of proving proper cost of gas at the city gate was upon the appellant but it did not assume that burden. Such evidence as was presented concerning the United was brought in on motion of the City and order of the Commission.

The United gas is not interstate gas when it reaches Columbus. It is mingled with other Ohio Fuel gas at the Ohio River and no attempt is ever made to separate it. The business of Ohio Fuel is local, not national in aspect, and north of Wheeler Station, at least, there can be no question but what United gas has lost its interstate nature.

As has already been mentioned, there was pending in 1929-1931, before the Commission of West Virginia, an important United rate case wherein it became necessary to fix a distribution rate for most of the centrally located important West Virginia cities and towns. Much testimony was taken and many exhibits offered. After that commission had made its findings and entered its order the matter was carried to the Supreme Court of Appeals of West Virginia where there were entered suggestions and modifications as well as a reversal with directions for that commission to proceed in accordance with the opinion and decree of the court. **City of Charleston v. Public Service Commission**, 110 W. Va. 245, 159 S. E. 38. (City Ex. No. 31, Original.)

Thereafter the West Virginia Commission, on October 3, 1931, readjusted its findings and revised its order. All of the testimony and exhibits and all of the findings and

opinions in this United case in West Virginia became a part of our Record in this Ohio case.

The contract price claimed by Ohio Fuel and United was 26.5 cents per M c. f. Through the witness Hightower, Company Ex. No. 80 was presented, wherein he pretended to use the West Virginia Commission's findings before its reversal by the Supreme Court of Appeals. (R., 2967.) He arrived at a price of 28.18 cents per M c. f. But on cross-examination it developed that Hightower had not followed the Commission and had made many mistakes. For example, he had forgotten that the West Virginia Commission had disallowed ½ of Columbia Engineering and Management fees, although he had included all of them—a mistake in operating expenses of some $144,792.00. (R., 2164, 2177.) He also made his computation on the basis of an 8 per cent. rate of return instead of the West Virginia Commission's 7 per cent. or the Ohio Commission's 6½ per cent., (R., 2967), although he admitted that in 1929 United paid an 18 per cent. dividend. (R., 2204.) He further included all leaseholds, both operated and unoperated, comprising all of the classes 1, 2, 3 and 4. (R., 2974, 2975.) Nor did he specially allocate for Ohio Fuel—nor, indeed, as between intrastate and interstate uses. Moreover, he made this computation by adding the increased capital charges for 1930 and also the operating charges for that year, without making any proper readjustments as to values, depreciation and the like. These figures were as of December 31, 1930, but the City, desiring them also as of

December 31, 1929, the date certain, suggested an additional statement, (R., 2[illegible]9), which was later submitted on a comparable basis showing the average cost per M c. f. for production and transmission to be 23.81 cents per M c. f., but without any special allocation to Ohio Fuel. It was simply a common system-wide gate-rate although the West Virginia Commission in its work had applied demand-mileage allocation as between domestic and wholesale use.

When the Ohio Commission found these conflicting claims they unanimously took their facts from the West Virginia Commission as adjusted by the application of the decision of the Court of Appeals of West Virginia and used a rate base many millions less than Hightower used in either of his computations. (R., 149, 150, 151, 193, 194.)

Commissioner Bricker of the Ohio Commission in the minority opinion found the proper cost of United gas to be 17.79 cents, the details of which are in "Exhibit A" of his opinion, (R., 215, 216); while the majority opinion found it to be 22 cents; the details are set forth in "Exhibit A" of their opinion. (R., 178.)

This difference of 4.21 cents per M c. f. when carried into the Ohio Fuel set-up represents a difference of about 1 cent per M c. f. and its effect would be to reduce the Columbus rate found by the majority from 55 cents to 54 cents.

The entire Commission was in agreement upon the value of United property as of December 31, 1929, it being the same as that found by the West Virginia Com-

mission as of December 31, 1928, extended by Williamson to December 31, 1929. (Company Exhibit 108, R., 3042, et seq.) Of this property a certain proportion was agreed upon as allocable to Ohio Fuel on the basis of M c. f. sales to Ohio Fuel during the year 1929. (R., 149, 150.)

The resulting difference between the minority and majority is accounted for as follows:

> "The entire Commission is not in accord as to the proper method of treating the item of expenses attributable to the West Virginia operations, the difference arising from the difference of treatment of delayed rentals and depreciation and amortization. The majority of the Commission is of the view that, as the evidence was presented in the case before the West Virginia Commission, this Commission is bound by the treatment thereof by that Commission." (R., 150.)

This is unsound. Apparently the majority drew no line between fact and law, between the finding of facts and the application of the law thereto. The minority accepted the facts as did the majority, that is the revised and adjusted facts found by the majority of the West Virginia Commission. The minority member refused to apply West Virginia law to these facts. His theory was that this is an Ohio case, involving only a distribution rate in an Ohio city, and that pertinent facts, whenever and wherever found, should be weighed in the balance of Ohio law and precedent.

We submit that this principle is sound.

The Court said: "With this conclusion of the minority of the Commission we are in accord." (R., 58.)

The general proposition of law, as established by the syllabus, is as follows:

> "1. In the valuation of a public utility by the Public Utilities Commission, the fact that certain service of the utility consists in the delivery and sale of gas produced in another state does not justify the application of the law of such other state to the facts found. Pertinent facts with reference to the value of the property of a public utility used and useful in the service of a community in this state are governed by Ohio law." (R., 51.)

Surely the law should not be otherwise where the sole question to be determined is the proper charge to operating expenses of an Ohio distributing company.

The finding of the minority here approved, however, included the United property valuation as fixed by the West Virginia Public Service Commission and allocated to the wholesale business. Ohio law was applied only in respect to the certain operating expenses before mentioned.

The evidence presented by the City supports the finding of the Court and minority Commissioner and shows that the maximum figure used by these bodies for the cost of United gas to Ohio Fuel is manifestly fair.

Blundon, witness for the City, allocated the property and expenses of United to the gas delivered to Ohio Fuel according to West Virginia law and even on that basis shows a fair charge to Ohio Fuel under Commissioner Mahood's findings of 18.28 cents and under Commissioner Nethken's finding of 17.04 cents per M c. f. These computations were not made from the valuations and figures

that Blundon had presented to the West Virginia Commission; for the West Virginia Commissioners they were made upon their own findings. Under "Protestants Basis" he showed that, using his own claims, valuations and expenses submitted, 15.75 cents would be a proper charge to Ohio Fuel. His summaries showing his computations of the various United charges are page 2 of City Ex. No. 88. (R., 3167, 3168.)

The Columbus Company has failed to show wherein its constitutional rights in this connection have been invaded.

Even though the finding of the majority, applying West Virginia law had been approved by the Court, which manifestly would not have been proper, still in view of the rather small difference in charge resulting to consumers in Columbus, it is apparent that if the Court were justified in reversing the majority on other important errors found and hereinbefore discussed, the cost of purchased gas to the Columbus Company would not be sufficiently increased to adversely affect the 48 cent ordinance rate.

11. The Contracts Between Related Companies.

Assigned Errors 9 and 10 alleging the impairment of obligations of contracts entered into between the Columbus Company and Ohio Fuel, (R., 2879), and between Ohio Fuel and United, (R., 2915), evidently still presume that these are arm's-length contracts. The Record is clear; they were not made between parties free

to deal under the ordinary conditions of "bargaining and competition". All of these companies are commonly owned by The Columbia Gas and Electric Corporation. (R., 691-694, 3072-3104B.)

The Commission and Court were at liberty to go behind the affiliated contracts and determine the reasonableness of inter-company charges.

This Court has fully disposed of the question in recent cases. The following language is clearly in point:

> "An averment of negotiation and effort to procure a reduction in the wholesale rate means little in the light of the fact that the negotiators are both acting in the same interest,—that of the holding company which controls both. All of these facts so pleaded in the pleadings would be far more persuasive with respect to the propriety of the rate if the parties were independent of each other and dealing at arm's length. Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is in effect one enterprise, the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered."
>
> "* * * It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject

to the usual safeguards of bargaining and competition."

Western Distributing Company v. Public Service Commission, 285 U. S. 119, 126, 127, supra.

We further cite **Smith v. Illinois Bell Telephone Company**, 282 U. S., 133, supra.

12. Other Alleged Errors.

Assigned Errors 6, 6 (a), 6 (b), 6 (c), 6 (d) and 6 (e) are mere repetitions and are already sufficiently answered in the foregoing discussions.

13. Due Process.

Appellant, at page 249 of its brief, complains that it was not accorded that sort of judicial inquiry to which under the Fourteenth Amendment and the decisions of this Court it was entitled. It then proceeds to quote four lines from the opinion of the Ohio Court upon which it evidently bases the contention. Here is the exact language of the Court:

"Depreciation is an incident to valuation. In considering the item of depreciation the court takes judicial cognizance of the fact that the trend of material and labor cost is downward. The case of Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U. S., 679, 43 S. Ct., 675, 67 L. Ed., 1176, is followed and approved in the case of Los Angeles Gas & Electric Corporation v. Railroad Commission of California, supra. In the opinion, Chief Justice Hughes quotes the Bluefield Water Works case, as follows: 'A pub-

lic utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures'.

"It will be remembered that the Supreme Court of the United States in this case was considering but one question, 'Was the rate fixed by the Railroad Commission confiscatory?' It disclaims all supervisory power. This court has none other than a supervisory jurisdiction in cases of this character, as provided by Article IV, Section 2, of the Constitution of Ohio, and conferred by Sections 544, et seq., General Code." (R., 68.)

It is the last four lines in the foregoing quotation to which appellant takes exception as an indication of lack of due process. The position is not tenable.

The Court refers to Article IV, Section 2, of the Ohio Constitution under which it is given jurisdiction in matters of this nature. That section provides that the Supreme Court of Ohio shall have

"such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." (Appendix.)

It was under this Constitutional provision that the Court assumed jurisdiction and proceeded.

The pertinent sections of the General Code of Ohio provide:

"Section 499-16. The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the supreme court of this state in the same manner and within the same time as other orders and decisions of the commission."

"Section 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

Proceedings in error are provided for as follows:

"Section 545. The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court, by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error."

"Section 546. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in

the proceeding complained of, which shall be filed in said court."

And it is further provided:

"Section 549. No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court."

The case of **Van Wert Gaslight Co. v. Public Utilities Commission,** 299 Fed. 670, was altogether unlike the present case. It has been cited in behalf of the Company as an authority in this matter but there is nothing analogous about it. Failure of due process in that case consisted of the commission adopting and the court affirming a previous valuation and the failure to determine a new valuation as of the date certain of the case. The Federal Court held that valuation must be determined de novo in each controversy. The instant case presents the converse of that situation and no one can truthfully contend that the properties were not reproduced as of December 31, 1929.

It will be noted that the statutory Court in the foregoing case took occasion to say there can be little question that the provision of the Ohio Constitution and the statutes enacted under it confer upon the Supreme Court judicial power to review all acts of the commission. That this is true is plain and we shall not further argue the point.

In the case at bar the Court reviewed the entire Record and exercised an independent judgment on the law and the facts as is clearly shown by the language of the opinion.

In the very beginning of the Court's opinion appears this unmistakable and significant expression:

> "We approach the decision of questions herein presented in the light of the principles laid down by the Supreme Court of the United States and by this Court. **It is not the function of this court to fix rates.** Under Ohio law, the city of Columbus has power to fix rates by ordinance, and did so fix the rate involved herein. The specific question is whether the rates so fixed are unreasonable, unlawful, and confiscatory. Upon that question the utilities have the burden of proof.
>
> "As stated by Mr. Chief Justice Hughes in the case of Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 820, decided May 8, 1933:
>
> "'That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established.'
>
> "**The specific question confronting us is the question whether the ordinance, enacted by the council of the city of Columbus and approved by a majority of the electors voting thereon in referendum, establishes a rate which is unreasonable, unlawful and confiscatory.** Section 614-46, General Code; Hocking Valley Ry. Co. v. Public Utilities Commission, 92 Ohio St. 362, 110 N. E., 952." (R., 56, 57.)

In order to prove that the Court assumed not only supervisory powers, but revisory authority as well, it is only necessary to mention the reversal of the Commission by the Court, after careful consideration of the Record and the findings of the Commission, and the consequent mandate to the Commission to revise its order to conform with the judgments rendered. (R., 273, 274.)

The independent consideration of the facts is plainly demonstrated by the Court throughout the opinion. For example, in dealing with Allocation the Court says:

> "Just why the city of Columbus should be charged for the pipe lines extending to Indiana, to Toledo, and to Cincinnati, we cannot understand. **By the preponderance of the evidence**, the transmission lines north and northeast of Columbus do not contribute to the Columbus gas supply, and the gas rate in Columbus should not share any part of the cost, maintenance or depreciation of these lines." (R., 61.) (Boldface ours.)

And again, under the subject of Taxes and Overheads, the following language occurs:

> "Upon the allowances made for taxes and general and direct overheads, we have given careful consideration to the opinion of both the majority and the minority of the Public Utilities Commission and have **reached the conclusion, upon the entire record**, that while there is no great difference between the majority and minority findings as to values and percentages taken, the figures presented and estimates made by the minority report are fair and just" (R., 64.) (Boldface ours.)

The Court also said:

> "The commission holds that life expectancy of the gas company's producing wells is three years and two months, and on this basis there should be an

annual amortization of $4,158,954. With this finding of the commission this court cannot agree.

"As indicated in the discussion above, the application of the principles laid down would result in a valuation even less in material parts than that arrived at by the minority of the commission. It follows that the court holds that the rate established by the ordinance in question is neither unreasonable, unlawful, nor confiscatory." (R., 72.)

The Constitutional sections and the applicable statutes have been in effect for more than twenty years.

The City submits that due process was fully afforded, that the facts and law were carefully weighed and considered by the Court and that its stated position in this matter is a proper one. The Supreme Court of Ohio is given no power by either the Constitution or the statutes to fix or prescribe rates. That is a legislative function and not a judicial one. Under the laws of Ohio that is the province of city councils and/or the Public Utilities Commission. The Court having determined that the rate fixed by the Commission in this cause was unreasonable and unlawful, remanded it to the Commission with a **mandate** to determine and fix a proper rate in conformity with the Court's findings of fact and law. (R., 273, 274.) The Commission, except for this appeal, would have proceeded to apply such findings, as anunciated by the Court, and prescribe the rate.

Witnesses.

It is evident that counsel for the Columbus Company are attempting to accomplish through their brief to this Court the very thing they failed to do before the Supreme Court of Ohio and the Commission. Their purpose there

was to destroy any and all witnesses appearing for the City.

They practically insist that no one is qualified to testify in a gas rate controversy unless he has been employed in the gas business. This is a safe rule for them to champion because those engaged in it have found it so lucrative that they rarely leave it.

They accuse a brilliant "young" engineer at the age of 34 of the crime of **youth.** The West Virginia Court, under similar attacks and before his appearance here, had found him to be "an experienced engineer."

Almost everything that the vocabulary permits has been said against Allensworth's ability and fairness, although he has proven himself a man of unusual ability, keen, thoughtful, thoroughly equipped for this work and a most capable witness. He has honestly and worthily represented great municipalities and even the state of Ohio. He has worked with some very reputable lawyers. He has had a wealth of experience. Chief counsel for the Columbus Company, as a former attorney-general of Ohio, used him for a long time in the Ohio Bell Telephone case. (R., 366, 414.) He has had 7 years' experience in the Columbus gas cases. Both the Master and the Court found him well qualified and followed him in many respects in the case before the Federal Court which was decided in 1927. **The Columbus Gas and Fuel Company v. City of Columbus,** 17 Fed. (2d), 630, supra.

Vitriolic attacks such as have been indulged in against the City's witnesses very plainly reveal deep personal prejudice, in which this Court is no more interested than were the lower Court and the Commission.

By referring to the City's experts as "hired", counsel for the Columbus Company apparently say that the witnesses called by the utility were not hired, but such

statements do them little credit because the Commission and the Court knew that every important witness appearing for the Columbia System and its subsidiaries were somehow and somewhere on corporate payrolls.

The expert engineer, who is willing and patriotic enough to give his time and energy to the people or to a city, is almost blacklisted when he begins unless he trims his sails to the passing breeze. Columbus cases are striking examples.

The Commission heard and observed the City's witnesses and in many respects followed the testimony of each of them. It found them well qualified and reliable, and the Supreme Court of Ohio—although the matter was presented at length by the Company—saw no reason to disturb that finding.

It is manifest that the requirements of due process were fully complied with, that the appellant was given every opportunity to properly present its case, both before the Commission and the Court, and that the facts and law were independently considered by the Court.

CONCLUSION.

It is respectfully submitted that the Record and the law fully support the findings of the Supreme Court of Ohio that the ordinance rate is neither unreasonable, unlawful nor confiscatory, and that its judgment should, therefore, be affirmed.

We submit the case.

Respectfully,
JOHN L. DAVIES,
City Attorney,
JAMES W. HUFFMAN,
Special Counsel,
Attorneys for the City of Columbus.

Columbus, Ohio.
March 3, 1934.

APPENDIX.

Constitution of the State of Ohio, Article IV, Section 2:

"The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. * * *."

Constitution of the State of Ohio, Article XVIII, Sections 2, 3, 4 and 5:

"Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

"Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

"Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

"Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

General Code of Ohio, Section 499-8:

"The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose author-

ized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public. * * *"

General Code of Ohio, Section 499-9:

"The commission shall prescribe the details of the inventory of the property of each public utility or railroad in the state; and such inventory shall include all the kinds and classes of property, with the value of each, owned by each public utility or railroad, used and useful for the service and convenience of the public. In ascertaining the value of the various kinds and classes of property, of each public utility or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

* * * * * * * * * * * *

(B) The value as of a date certain, of each parcel of land owned and used by such public utility or railroad, by comparison with the value of contiguous and neighboring parcels of land, and land of similar character as to location and use.

* * * * * * * * * * * *

(D) The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

(E) Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

(F) The net value as of a date certain, of all physical property other than land, owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

(G) If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value.

* * * * * * * * * * * * *

Such investigations and report shall show separately the property used and useful to such utility or railroad in the furnishing of the service to the public, and the property held by such utility or railroad for other purposes, and such other items concerning values and methods of making valuations as the commission may deem proper; which said inventories and reports shall be filed in the office of the commission for the information of the governor and the General Assembly."

General Code of Ohio, Section 499-13:

"* * * Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railorad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act."

General Code of Ohio, Section 499-16:

"The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the

supreme court of this state in the same manner and within the same time as other orders and decisions of the commission."

General Code of Ohio, Section 544:

"A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

General Code of Ohio, Section 545:

"The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the Supreme Court, by any party to the proceeding before the commission, against the Public Utilities Commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error."

General Code of Ohio, Section 546:

"Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court."

General Code of Ohio, Section 614-2:

"The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term 'commission' when used in this act, or in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto means 'the public utilities commission of Ohio.'

The term 'commissioner' means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * * * * * *

When engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, is a natural gas company;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

* * * * * * * * * * * * *

General Code of Ohio, Section 614-2a:

"The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as 'railroads' in G. C. 501 and 502, and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act."

General Code of Ohio, Section 614-3:

"The public utilities commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate 'public utilities' and 'railroads' as herein defined and provided and to require all public utilities to furnish their products and render all services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public."

General Code of Ohio, Section 614-44:

"Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of Secs. 3644, 3982, and 3983 of the General Code between the municipality and such public utility with respect to the rate, price, charge, toll or rental to be made, charged, demanded, collected or exacted, for any commodity, utility or service by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in Sections 3644, 3982 and 3983 of the General Code. Thereupon the commission, upon complaint in writing, of such public utilities or upon complaint of one percentum of the electors of such municipal corporation, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality of the time and place of the hearings thereof, and which shall plainly state the matters and things complained of. * * * Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such

municipality, and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day. The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses."

General Code of Ohio, Section 614-46:

"If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by

ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance is just and reasonable, and ratify and confirm the same.

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product during such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. If the commission, after the hearing provided for in Sections 614-44 and 614-46 of the General Code shall be of the opinion that any provisions of the ordinance appealed from or complained of other than the rate, price, charge, toll or rental fixed thereby are or will be unjust or unreasonable or that the form and structure of the rate, price, charge, toll or rental fixed thereby may be unfair or unreasonable, or may have the effect of causing any rate, price, charge, toll or rental to be fixed by the commission to become unfair or unreasonable, the commission shall in its order strike out such unjust or unreasonable provisions, conditions, form and structure of said ordinance and shall substitute therefor, if it deem it necessary such provisions and conditions as it may consider fair and reasonable, and make such changes in the form and structure of the rate, price, charge, toll or rental fixed in such ordinance as it may consider fair and reasonable."

SUPREME COURT OF THE UNITED STATES.

No. 937.—October Term, 1933.

The Columbus Gas & Fuel Company, Appellant, *vs.* The Public Utilities Commission of Ohio and the City of Columbus, Ohio, Appellees,	On appeal from the Supreme Court of the State of Ohio.

[May 21, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

An ordinance of the City of Columbus, Ohio, approved by the electors at a referendum vote, provides that for five years from November 12, 1929, the price to be charged for natural gas shall be at the rate of 48 cents per thousand cubic feet with a minimum charge of 75 cents per month.

The appellant, the Columbus Gas & Fuel Company, supplies gas to consumers in the City of Columbus, purchasing the gas from the Ohio Fuel Gas Company, an affiliated corporation. Part of the gas so supplied is produced by the Ohio Fuel Gas Company in its own gas fields, part is bought by it from another affiliated corporation, the United Fuel Gas Company, and part from independent producers. The three affiliated corporations, i. e., the appellant, the Ohio, and the United, are subsidiaries of one parent company, the Columbia Gas & Electric Corporation.

On December 31, 1929, the Columbus Gas & Fuel Company filed a complaint with the Public Utilities Commission of Ohio in which it prayed that the rate prescribed by the ordinance be declared to be inadequate and that such other rate be substituted as might be found to be just and reasonable. To dispose of that complaint there was need of an inquiry into the value of the complainant's property and into its operating expenses, which in turn necessitated an inquiry into the property and expenses of its affiliated corporations. Until some time in 1929, there had been a contract between the Columbus Company and the Ohio Fuel Gas Company whereby for gas delivered at the city gateway Columbus was to